No. S276545

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES LOGAN,
Plaintiff/Respondent,

vs.

COUNTRY OAKS PARTNERS, LLC et al.,
Defendants and Appellants.

On Review of a Judgment by the Court of Appeal,
Second Appellate District, Division Four (B312967)
(Los Angeles County Super. Ct. No. 20STCV26536)

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS

To The Honorable Chief Justice of California:

Pursuant to Rule 8.520(f) of the California Rules of Court, the Association of Southern California Defense Counsel (ASCDC or Association) and Civil Justice Association of California (CJAC) seek leave to file the attached amici curiae brief in support of Appellants Country Oaks Partners, LLC and Sun Mar Management Services, and urge the Court to reverse the Court of Appeal's published opinion in *Logan v. Country Oaks Partners, LLC* (August 18, 2022, B312967) 82 Cal.App.5th 365.

The case presents important issues regarding the scope of authority of an agent for health care decisions. Specifically, does authority to make arrangements for health care on behalf of the principal include authority to enter into agreements to arbitrate disputes that concern the care provided? As the accompanying brief will discuss, California law clearly confers such authority. An "advance directive" or other instrument appointing an agent to arrange for health care services necessarily encompasses authority to enforce the terms for providing those services, including the statutory duty, stated in Civil Code section 1714, to

be held "responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by [the provider's] want of ordinary care or skill in the management of [patient's] property or person." And authority over enforcement must include authority to select the means of enforcement, as this Court recognized in *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699. The Court of Appeal in this case has singled out dispute resolution through arbitration as one term an agent may not include in a contract on behalf of the principal. That is contrary to California's legislative scheme applicable to agency agreements, including advance directives in the health care context. Further, it is preempted when applied to "disfavor" contracts governed by the Federal Arbitration Act (FAA).

INTEREST OF AMICI CURIAE

ASCDC is a voluntary membership association comprised of more than 1,000 attorney-members, among whom are some of the leading trial lawyers of California's civil defense bar. ASCDC's members primarily represent parties involved in legal disputes from the business community, professionals, including attorneys, accountants and financial professionals, health care providers, religious, and civic institutions who provide the goods

and services vital to our nation's economic health and growth. Founded in 1959, the Association is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice in this state.

Founded in 1979, CJAC is a nonprofit organization representing businesses, professional associations, and financial institutions. Its principal purpose is to educate the public about ways to make our civil liability laws more fair, certain, economical, and efficient.

CJAC and ASCDC (collectively "amici") and their constituent members are substantially interested in the proper development of clear and consistent rules under California law governing the authority of an agent appointed by an advance medical directive to enter into arbitration agreements on behalf of the principal for the resolution of disputes concerning the health care arranged by the agent with medical providers.

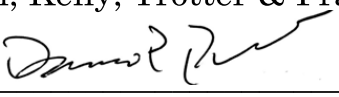
Other than amici and their members, no one has made any financial contribution in connection with the accompanying brief that they submit in support of Appellants.

Amici respectfully request that this application for leave to file the within brief be granted.

Respectfully submitted,

Dated: June 26, 2023

Carroll, Kelly, Trotter & Franzen



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Respectfully submitted,

Dated: June 26, 2023

Civil Justice Association of California

/s/ Fred J. Hiestand

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BRIEF OF AMICI CURIAE ASCDC AND CJAC IN SUPPORT OF APPELLANTS

I. SUMMARY OF ISSUES PRESENTED AND AMICI'S ARGUMENTS

The primary issue presented here is: Whether an advance health care directive and power of attorney appointing an agent to make health care decisions encompasses the agent's power to sign an agreement on behalf of the principal to arbitrate disputes with the medical facility selected by the agent to provide care.

The opinion of the Court of Appeal in *Logan* (Second Appellate District, Div. 4) in this case answered, "No." That opinion's analysis conflicts with at least two prior decisions of other Courts of Appeal, *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 (Second Appellate District, Div. 5) (*Garrison*) and *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259 (Fourth Appellate District, Div. 3) (*Hogan*). *Garrison* and *Hogan* properly applied and followed *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 (*Madden*) when analyzing California agency law by answering the question, "Yes."

Additionally, this case presents the question whether the Court of Appeal's conclusion that the Advance Directive must contain a "clear-statement" of the agent's power to sign an arbitration agreement when entering into contracts with health care providers is preempted under the Federal Arbitration Act (FAA). In *Kindred Nursing Centers Ltd. v. Clark* (2017) 581 U.S. 246, the United States Supreme Court rejected Kentucky's adoption of such a "clear-statement rule"; holding that an arbitration agreement signed by an agent pursuant to an advance directive-power of attorney cannot be singled out for this kind of "disfavored treatment." (*Id.* at 248, 252.) The power of attorney need not specifically authorize each act the agent undertakes — such as agreeing to arbitrate disputes – so long as the agent's acts are carried out to accomplish the purposes of the directive; e.g., contracting with a health facility in providing for the principal's medical care. (*Cf. Logan*, 82 Cal.App.5th at 369 [ruling, contrary to Kindred, that an advance directive "must specifically address [the agent's] authority to execute an arbitration agreement"].)

This Court's analysis of California agency law in *Madden*, as followed by *Garrison* and *Hogan*, is consistent with California

statutes regarding agency by power of attorney, the FAA, and both the California and United States Constitutions. As discussed in more detail below, the stark conflict created by the *Logan* opinion cannot be reconciled with these soundly reasoned principles and should be reversed.

II. THE REASONING OF MADDEN REMAINS SOUND — THE AUTHORITY OF AN AGENT TO AGREE TO ARBITRATE CLAIMS OF THE PRINCIPAL UNDER CALIFORNIA LAW IS WELL-ESTABLISHED

Civil Code section 2319, the general agency law, gives an agent power "[t]o do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his [or her] agency." That general principle is consistent with a solid line of California precedent specifically addressing the authority of an agent responsible for the health care decisions for a principal.

A. California Case Law Recognizes Authority of Agent to Agree to Arbitrate Disputes Relative to Health Care

Applying agency principles, *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, held: "The acts of an agent within the scope of his authority bind the principal (see Civ. Code, § 2330); application of this rule in the present context yields the

conclusion that contract provisions, as well as amendments to the contract, negotiated by the board within the scope of its authority as an agent, bind those employees who enroll under the contract." (*Id.* at 705-706.)

As *Madden* reasoned, by virtue of agency law the representative appointed to negotiate health care arrangements for union members had "implied authority to agree to a contract which provided for arbitration of all disputes, including malpractice claims, arising under that contract. That issue turns on the application of Civil Code section 2319, which authorizes a general agent 'To do everything necessary or proper and usual . . . for effecting the purpose of his agency.'" (*Id.* at 706.)

Although that contractual arrangement was negotiated on behalf of a group, *Madden* concluded without qualification "that arbitration is a 'proper and usual' means of resolving malpractice disputes, and thus that an agent empowered to negotiate a group medical contract has the implied authority to agree to the inclusion of an arbitration provision." (*Id.* at 706.)

In so doing, *Madden* soundly rejected any notion that arbitration is "an extraordinary method of resolving disputes and that consequently the authority of an agent to agree to

arbitration must be specially conferred." (17 Cal.3d at 707.) Observing that the "era of judicial hostility to arbitration" had "long since receded into a remote past," *Madden* further states: "The agent today who consents to arbitration follows a 'proper and usual' practice 'for effecting the purpose' of the agency; he merely agrees that disputes arising under the contract be resolved by a common, expeditious, and judicially-favored method." (*Id.*)

Madden referred to advantages of arbitration that accrue to both claimant and respondent, observing "the growing interest in and use of arbitration to cope with the increasing volume of medical malpractice claims." (*Id.* at 708.)

Madden also pointed out that by the time of that decision California law extending broad powers to an agent to enter into arbitration agreements was already well-established by Justice Traynor's decision in *Doyle v. Giuliucci* (1956) 62 Cal.2d 606, 610, stating: "[W]e held that the minor was bound by the provision of the agreement to submit her malpractice claim to arbitration. '[T]he power to enter into a contract for medical care that binds the child to arbitrate any dispute arising thereunder,' we stated, 'is implicit in a parent's right and duty to provide for the care of

his child,'" and that the arbitration clause did not unreasonably limited the minor's rights, stating, "'The arbitration provision in such contracts is a reasonable restriction, for it does no more than specify a forum for the settlement of disputes.'" (*Madden*, 17 Cal.3d at 708-709.)

Returning to agency principles as the basis for decision, *Madden* observes: "We do not believe *Doyle* can be distinguished from the instant case because it involves a parent contracting on behalf of a child instead of an agent contracting on behalf of its principal. Both parent and agent serve as fiduciaries with limited powers, and if, as *Doyle* holds, the implied authority of a parent includes the power to agree to arbitration of the child's malpractice claims, we perceive no reason why the implied authority of an agent should not similarly include the power to agree to arbitration of the principal's malpractice claims." (*Madden* at 708-709.) Thus, emphasizing agency as the foundation for the authority to enter into arbitration contracts, *Madden* held: "We therefore conclude that an agent or other fiduciary who contracts for medical treatment on behalf of his beneficiary retains the authority to enter into an agreement

providing for arbitration of claims for medical malpractice." (*Id.* at 709.)

More recently, *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944 recognized the constitutional values underpinning *Madden*, noting that arbitration is a legislatively-endorsed method of addressing potential disputes as an alternative method of dispute resolution explicitly approved by Article I, section 16 of our Constitution. (*Id.* at 955; citing *Madden*, 17 Cal.3d at 714.)

Grafton Partners also quotes from Code of Civil Procedure section 1281: "'A written agreement to submit to arbitration an existing controversy *or a controversy thereafter arising* is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.'" (*Grafton Partners*, 36 Cal.4th at 955; italics original.) Therefore, unless the agent has entered into a contract that is *void* on "grounds as exist for the revocation of any contract," then under *Madden* and *Grafton Partners*, and consistent with the edicts of the FAA, California courts must enforce a pre-dispute arbitration agreement made by an agent on behalf of the principal. (See 9 U.S.C. § 2; *Kindred*, 581 U.S. at 248, 252, 137 S.Ct. at 1424, 1426-1427; discussion in Section III. post.)

Within the month after *Grafton Partners* was decided, *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 upheld another arbitration agreement made by an agent in connection with her principal's admission to a long term residential care facility. The agency determination was driven by the same statutes implicated here, "three provisions of the Health Care Decisions Law in Probate Code section 4600 et seq." (*Id.* at 265.)

First, *Garrison* referred to Probate Code section 4683(a), which states: "'Subject to any limitations in the power of attorney for health care: [¶] (a) An agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so." (*Garrison*, 132 Cal.App.4th at 265-266.) "Second Probate Code section 4684 states: 'An agent shall make a health care decision in accordance with the principal's individual health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.'" (*Id.* at 266.)

"Third, Probate Code section 4688 states, 'Where this division does not provide a rule governing agents under powers of attorney, the law of agency applies.'" (*Id.*)

Summing up the combined significance of the foregoing provisions, *Garrison* held that the agent, Ms. Garrison, had the authority to enter into arbitration agreements on behalf of her principal in the course of making health care decisions on behalf of the principal. "Whether to admit an aging parent to a particular care facility is a health care decision. The revocable arbitration agreements were executed as part of the health care decisionmaking process." (*Garrison*, 132 Cal.App.4th at 266.) The principal gave Ms. Garrison authority over matters such as choosing a health care facility based on a variety of factors, one of which is whether the facility includes an arbitration agreement in its care contract. (*Id.*) And, "if there are any matters not covered by the Health Care Decisions Law, the law of agency is controlling." (*Id.*)

The general law of agency provides additional support for the sound analysis of *Madden*, *Grafton*, and *Garrison*. California courts have consistently recognized the authority of an agent to bind a principal to arbitration relative to transactions and

relationships. This is true of all California contracts in general, and there is no plausible "exception" for agreements to arbitrate that pertain to health facilities providing medical care to an incapacitated person, here, Mr. Logan.[1]

On the record in this matter, that power was indisputably extended to Mr. Harrod under the Advance Directive signed by his uncle, Mr. Logan – expressly providing for the "'agent's authority to make 'health care decisions' on a principal's behalf …'" (*Logan*, 82 Cal.App.5th at 369.) *Logan* parts company with prior case law by reaching the opposite conclusion about the agent's power to agree to arbitrate.

By parity of reasoning, *Nguyen v. Tran* (2007) 157 Cal.App.4th 1032 explains that while only *contracting parties* may be compelled to arbitrate, under agency law, "an arbitration agreement may be enforced by or against nonsignatories [in cases

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[1] See also *Hutcheson v. Eskaton Fountain Wood Lodge* (2017) 17 Cal.App.5th 937, 945, stating "a person who is authorized to act as the patient's agent can bind the patient to an arbitration agreement"; referring to *Goldman v. Sun Bridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1169; *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142; *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587. These cases all readily accept an agent's authority to enter into arbitration agreements where the power to make "health care decisions" has been expressly conferred.

that] include where a nonsignatory is a third party beneficiary of the agreement" and "when a nonsignatory and one of the parties to the agreement have a *preexisting agency relationship* that makes it equitable to impose the duty to arbitrate on either of them." (*Id.* at 1036-1037, italics added.) Again, the law of agency controls.

B. California Statutes Recognize that Agents' Authority to Arrange Services or Make Transactions Includes Authority to Elect to Resolve Disputes by Arbitration

Consistent with *Madden's* approach, in a variety of consumer and business "transactions" defined by the general agency law, the Legislature has expressly authorized an agent when acting under a statutory form "power of attorney" to routinely engage in acts necessary to enforce the rights of the principal on matters within the scope of that agency. (Prob. Code § 4401.)

Probate Code section 4450 empowers the agent appointed under that "form" to do all of the following (unless expressly limited by the principal), including to agree to arbitrate disputes, providing:

(a) ***Demand, receive, and obtain by litigation or otherwise***, money or other thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended.

(b) ***Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction***, and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal.

(c) ***Execute***, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or ***other instrument the agent considers desirable to accomplish a purpose of a transaction***.

(d) ***Prosecute, defend, submit to arbitration***, settle, and propose or accept a compromise with respect to, a claim existing in favor of or against the principal or intervene in litigation relating to the claim."

(Prob. Code, § 4450, subds. (a) – (d), bold and italics added.)

Madden and it progeny faithfully adhere to basic principles of statutory construction when addressing agency law; namely,

that courts "do not examine that language in isolation, but *in the context of the statutory framework as a whole* in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 381, italics added.) The California courts are thereby tasked to apply the "rules favoring statutory construction to avoid absurd or unjust results, account for [the complete] statutory context, and uphold a statute's constitutionality when reasonably possible." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 851.)

In this matter, neither the Court of Appeal nor plaintiff offer any principled basis for departing from *Madden* and these fundamental tenets of California agency law. In contrast to *Madden's* cogent analysis, the *Logan* court maintains that because the Legislature "decoupled" the presentation of the option to arbitrate disputes from the admission agreement presented by a skilled nursing facility, it should be presumed that the agent is not authorized to agree to arbitrate on behalf of an incapacitated patient unless that specific power is spelled out in the Advance Directive. (*Logan*, 82 Cal.App.5th at 369, 372-373.) The opposite is true.

Until this case, California precedent had consistently applied *Madden's* view of agency law for almost fifty years. No "specific" grant of authority in this Advance Directive was required for the agent to agree to arbitrate disputes with a skilled nursing facility. And in no event could any such limitation on the agent's power – whether enacted by the Legislature or adopted by judicial fiat as the *Logan* opinion attempts to do – pass constitutional muster under the preemption clause in light of the FAA.

III. PLAINTIFF'S POSITION THAT THE ADVANCE DIRECTIVE DOES NOT SPECIFICALLY EXTEND AUTHORITY FOR THE AGENT TO AGREE TO ARBITRATE DISPUTES WITHIN THE SCOPE OF ARRANGING FOR THE PATIENT'S MEDICAL NEEDS IS CONTRARY TO CALIFORNIA LAW AND IS PREEMPTED BY THE FAA

The FAA requires courts to place arbitration agreements "on equal footing with all other contracts." (*Kindred Nursing Ctrs. Ltd. v. Clark* (2017) 581 U.S. 421, 428, 137 S.Ct. 1421, 1424-1425, 197 L.Ed.2d 806 (*Kindred*), quoting *Buckeye Check Cashing, Inc. v. Cardegna* (2005) 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038; see 9 U.S.C. § 2.)

Relative to defining the scope of an agent's authority under an advance medical directive, the Kentucky Supreme Court in

Kindred had declined to give effect to two arbitration agreements executed by individuals holding "powers of attorney" – that is, authorizations to act on behalf of others to provide for their health care needs. (*Kindred*, 581 U.S. at 428, 137 S.Ct at 1425.) According to the Kentucky court, "a general grant of power (even if seemingly comprehensive) does not permit a legal representative to enter into an arbitration agreement for someone else; to form such a contract, the representative must possess *specific authority* to *waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury*." (*Id.*, italics added)

This is known as the "clear-statement rule." Because the rule "singles out arbitration agreements for disfavored treatment," the United States Supreme Court granted certiorari and ultimately held that Kentucky's clear-statement rule violated the FAA. (*Kindred*, 581 U.S. at 248, 137 S.Ct. at 1424-1425.)

As the United States Supreme Court explained:

> The Kentucky Supreme Court's clear-statement rule, in just that way, fails to put arbitration agreements on an equal plane with other contracts. By the court's own

account, that rule (like the one *Concepcion*[2] posited) serves to safeguard a person's "right to access the courts and to trial by jury." 478 S.W.3d at 327 …. In ringing terms, the court affirmed the jury right's unsurpassed standing in the State Constitution: The framers, the court explained, recognized "that right and that right alone as a divine God-given right" when they made it "the *only* thing" that must be "'held sacred'" and "'inviolate.'" 478 S.W.3d, at 328-329 (quoting Ky. Const. §7).[3] So it was that the court required an explicit statement before an attorney-in-fact, even if possessing broad delegated powers, could relinquish that right on another's behalf. See 478 S.W.3d, at 331 ("We say only that an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal"). And so it was that the court did exactly what *Concepcion* barred [see 563 U.S. at 341-342]: adopt a legal rule hinging on the primary characteristic of an arbitration agreement – namely, a waiver of the right to go to court and receive a jury trial. … *Such a rule is too tailor-made to arbitration*

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[2] *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. 333, 339, 341-342, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (*Concepcion*).

[3] Article I, section 16 of the California Constitution similarly provides for an "inviolate" right to a "trial by jury" in this State; except to the extent that such right may be waived by legislatively-approved means – including arbitration. (*Grafton Partners*, *supra,* 36 Cal.4th at 958; see also *id.* at 955-956.)

> *agreements* – subjecting them, by virtue of their defining trait, to uncommon barriers – *to survive the FAA's edict against singling out those contracts for disfavored treatment*.

(*Kindred*, 581 U.S. at 252, 137 S.Ct. at 1426-1427; italics and bracketed citations and footnotes added.)

The *Logan* opinion likewise violates the "edict" of the FAA. *Logan* follows the same flawed line of reasoning as the Kentucky court in rejecting the agent's power to enter into an arbitration agreement under his power of attorney, supposedly because: "The Advance Directive *does not specifically address* Harrod's authority to execute an arbitration agreement on Logan's behalf." (*Logan*, 82 Cal.App.5th at 369, italics added.)

Logan purports to "distinguish" *Madden's* analysis of the agent's powers under the Probate Code (also embraced by *Garrison* and *Hogan*) which concluded that California law must be broadly construed to extend authority to enter into arbitration agreements encompassed within the "proper and usual" subject matter of the agency – namely, negotiating contracts relating to the patient's medical care. (*Logan*, 82 Cal.App.5th at 372-374.) Inconsistent with *Kindred*, and disconnected to California's own statutes regarding scope of authority vested in an agent by power

of attorney, *Logan* suggests that while the agent's decision to contract with a skill nursing facility to provide services to the principal is a "health care decision," the optional agreement to arbitrate disputes relating to those very health care services is not. (*Id.* at 373.)

On the contrary, both admission and arbitration are among the "proper and usual" legal agreements within the scope of the agent's powers because both relate to the subject matter of "health care decisions" that the agent was appointed to make for a principal who is unable to act for himself. (*Madden*, 17 Cal.3d at 710-711; *Garrison*, 132 Cal.App.4th at 265-266.) Indeed, contrary to *Logan's* analysis, this State explicitly recognizes in numerous contexts that an "agent" acting under a power of attorney may sign arbitration agreements waiving the principal's right to a court or jury trial. (E.g., Prob. Code, § 4450.)

In spite of those factors, *Logan* invokes the same "clear-statement rule" that *Kindred* held was preempted under the FAA by impermissibly "disfavoring" arbitration in the course of procuring medical services negotiated by someone who was expressly appointed to act on the dependent patient's behalf. No more "specific authority" to sign an arbitration agreement is

required for an agent acting within the scope of the advance directive. (*Kindred*, 581 U.S. at 248-252, 137 S.Ct. at 1425-1428; contra *Logan*, 82 Cal.App.5th at 374 ["The Advance Directive does not address arbitration agreements"].)[4]

The preemption doctrine applies in this context whether the "clear-statement rule" that ostensibly impairs the agent's ability to negotiate an agreement to arbitrate is adopted by a statutory enactment, executive regulation or judge-made rule. (See *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2023) 62 F.4th 473, 486 [California's AB 51 preempted because it "disfavors the formation of agreements that have the essential terms of an arbitration agreement"]; *Valley View Health Care, Inc. v. Chapman* (E.D. Cal. 2014) 992 F.Supp.2d 1016, 1040 [California laws and regulations prohibiting "arbitration" of Patient's Bill of Rights claims under the Health & Safety Code permanently enjoined by virtue of FAA preemption]; *Kindred*,

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[4] As Justice Kagan goes on to write: "Making matters worse, the Kentucky Supreme Court's clear-statement rule appears not to apply to other kinds of agreements [made by agents] relinquishing the right to go to court or obtain a jury trial." (*Kindred*, 581 U.S. at 252, 137 S.Ct. at 1427, fn. 1.) So does the clear-statement rule employed by *Logan*, which would improperly proscribe an agent's agreement to arbitrate with health care facilities. (82 Cal.App.5th at 369, 372.)

581 U.S. at 248, 252, 137 S.Ct. at 1425, 1426-1428 [judicial rule requiring a "clear-statement" of agent's authority to waive the principal's "sacred right" to a trial by jury was preempted].)

It is no answer for *Logan* to say that all agreements to arbitrate entered into by an agent with health care facilities should be avoided as "adhesion" contracts on the basis of supposedly "unequal bargaining power." (E.g., *Logan*, 82 Cal.App.5th at 372; see Logan's Ans. Br. at 23.) *Madden* readily disposed of that argument decades ago. (*Cf. Madden*, 17 Cal.3d at 710 ["principles that govern contracts of adhesion do not bar enforcement of the arbitration amendment" negotiated by the union members' appointed agent].)

Moreover, the "decoupling" of agreements to arbitrate disputes arising from the performance of medical services after admission to a health care facility under Health and Safety Code section 1599.81 relied upon by the Court of Appeal actually demonstrates the utter lack of any "adhesive" quality of an optional, revocable agreement to arbitrate disputes with long term care facilities, such as Country Oaks.

Upon admission to a skilled nursing facility, either the principal (here Mr. Logan) or his agent (Mr. Harrod) is separately

presented with an agreement that provides for the option to arbitrate disputes arising from the medical care provided – in lieu of litigation – in precisely the same fashion as mandated by the statute. (*Logan*, 82 Cal.App.5th at 372-373 [suggesting that an agent's authority to sign the "decoupled" arbitration contract under section 1599.81 still must be limited under state and federal law because agreements with skilled nursing facilities should be deemed to involve issues of "unequal bargaining power"].)

Logan disregards that whether the agreement providing for arbitration is signed by the patient or by his proxy under an Advance Directive, the identical process upon admission is evenhandedly followed. As *Madden*, *Garrison* and *Hogan* aptly recognize, this is the same scenario contemplated by section 4683 of the Probate Code which expressly authorizes the agent to make "health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so." (*Garrison*, 132 Cal.App.4th at 265-266, quoting the statute, italics added; *Hogan*, 148 Cal.App.4th at 264-269 [describing the agent's authority to sign arbitration

agreements under the Health Care Decisions Law and general agency law].)

In light of the power explicitly granted to make such decisions under the "Health Care Decisions Law," to say that the agent has less power to agree to arbitrate health care disputes upon presentation of the identical section 11599.81 notice called for under the statute, by definition, "disfavors" arbitration contracts entered into by an agent. (Appellant's OBM at 17-18; Appellant's Reply Br. at 16-17 & n. 1.)

Indeed, if *Logan's* "clear-statement rule" were a legislative enactment that otherwise attempted to limit an agent's authority to arbitrate disputes under the Advance Directive, that would likewise run afoul of the FAA. (*Kindred*, 581 U.S. at 252, 137 S.Ct. at 1426-1427; see *Valley View Health Care, Inc. v. Chapman*, 992 F.Supp.2d at 1040-1044, 1050 [the FAA preempts, and California was permanently enjoined from enforcing, any "ban" on agreements to arbitrate claims against health care facilities under Health & Saf. Code § 1599.81(d) and 22 CCR § 72516(d)].)

Whether the agent's power to agree to arbitrate disputes after the patient's admission to a nursing home is ostensibly

being limited by a statute or a judicially crafted "clear-statement" rule, the rationale offered by *Logan* presents an obstacle which impermissibly disfavors arbitration that cannot be squared with the Supreme Court's FAA preemption jurisprudence. (*Kindred*, 581 U.S. at 252, 137 S. Ct. at 1426-1427; *Concepcion*, 563 U.S. at 341-342: see also *Bonta*, 62 F.4th at 484-486, discussing *Kindred*.)

IV. CONCLUSION

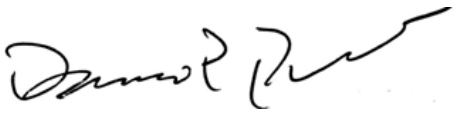
For all the foregoing reasons, there is no plausible basis to distinguish or overturn the sound reasoning of *Madden*, confirming the "proper and usual" power of an agent to negotiate arbitration agreements within the scope of his or her authority when making health care arrangements on the principal's behalf.

That application of California's statutory scheme has been consistently (and correctly) followed by the case law for almost 50 years. The decision below cannot be reconciled with *Madden*, the Health Care Decisions Law or the FAA. *Logan* should be reversed.

Respectfully submitted,

Dated: June 26, 2023

Carroll, Kelly, Trotter & Franzen



David P. Pruett
Attorneys for Amicus Curiae
Association of Southern California
Defense Counsel

Respectfully submitted,

Dated: June 26, 2023

Civil Justice Association of California

/s/ Fred J. Hiestand

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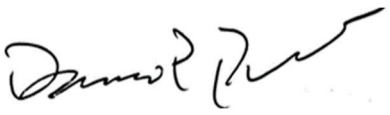
Certificate of Compliance

Pursuant to California Rules of Court, I hereby certify that the foregoing Respondent's Brief was produced using 13-point Century Schoolbook type style and contains 5,060 words. In making this certification, I have relied on the word count function of Microsoft Word 2010.

Dated: June 26, 2023



David P. Pruett

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 90802-4646. On June 26, 2023, I electronically filed the foregoing **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF APPELLANTS** on counsel of record via the Court's electronic filing system, operated by TrueFiling on the attached list of interested parties.

On the same date, I served a copy of the **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF APPELLANTS** by first class U.S. mail on Los Angeles Superior Court, Hon. Monica Bachner, 111 N. Hill Street, Los Angeles, CA 90012.

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office of a member of the Bar of the within court at whose direction this service was made. Executed on June 26, 2023, at Long Beach, California.

A Lorraine Orduno

A LORRAINE ORDUNO

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