Case No. S276545
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHARLES LOGAN,

Plaintiff and Respondent,

v.

COUNTRY OAKS PARTNERS, LLC et al.,

Defendants and Appellants.

On Review of a Judgment by the Court of Appeal,
Second Appellate District, Division Four, Case No. B312967

Los Angeles Superior Court, Case No. 20STCV26536

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF/RESPONDENT CHARLES LOGAN, BY AARP, AARP FOUNDATION, JUSTICE IN AGING, CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, CALIFORNIA LONG-TERM CARE OMBUDSMAN ASSOCIATION and THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE; PROPOSED BRIEF

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ATTORNEYS FOR PROPOSED *AMICI CURIAE*

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Proposed *amici* respectfully request leave to file the accompanying *amicus curiae* brief in support of Plaintiff/Respondent Charles Logan.

No party to this action or counsel to any party has provided any form of support with regard to the authorship, preparation, or filing of this brief. No person or entity, including any party or party's counsel, made a monetary contribution with the intent to fund the preparation or submission of this brief.

Interests of Proposed *Amici Curiae*

AARP

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering people 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health security, financial stability and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation fight to protect the rights of older adults who are abused and neglected in nursing facilities, in courts nationwide. AARP and AARP Foundation have filed amicus

briefs in many state and federal cases that challenged the enforceability of pre-dispute arbitration clauses in long-term care, consumer, and employment contracts. (*See, e.g., Kindred Nursing Ctrs Ltd. P'ship v. Clark* (2017) 137 S. Ct. 1421; *Taylor v. Extendicare Health Facilities, Inc.* (Pa. 2015) 147 A.3d 490; *Dickerson v. Longoria* (Md. App. 2010) 995 A.2d 861.)

Justice in Aging

Justice in Aging is a national non-profit organization with the principal mission of protecting the health and economic security of low-income older Americans. Justice in Aging's work puts special emphasis on persons who have historically been disadvantaged, including women, members of the LGBT community, people of color, and people with limited English proficiency. Justice in Aging has a long-standing record of advocacy for nursing facility residents, including federal advocacy dating back to the 1987 enactment of the federal Nursing Home Reform Law. Among other advocacy, Justice in Aging has submitted comments to the federal government on the federal regulation limiting arbitration in nursing facility admissions (42 C.F.R. § 483.70(n)) and appeared as *amicus* in defense of the regulation in *Northport Health Servs. of Ark. v. United States HHS* (W.D. Ark. 2020) 438 F. Supp. 3d 956.

California Advocates for Nursing Home Reform

California Advocates for Nursing Home Reform (CANHR) is a non-profit organization that represents the interests of approximately 100,000 California nursing facility residents and their families. Since 1983, CANHR has been advocating for the rights of long-term care residents. CANHR and its 3,000 members have a substantial interest in ensuring that quality care be provided to persons living in nursing facilities and that they have access to all forums for dispute resolution. CANHR maintains a website to educate long-term care residents about their rights in nursing facilities, including a special section on pre-dispute arbitration agreements. CANHR contributed multiple rounds of comments to the Centers for Medicare and Medicaid Services (CMS) from 2015-2019 when CMS proposed regulations regarding the use of pre-dispute arbitration agreements in nursing facilities, and regularly provides legal education to California attorneys about health care powers of attorney, the authority of power of attorney agents, and the enforceability of pre-dispute arbitration agreements signed by third parties and surrogates.

California Long-Term Care Ombudsman Association

Long Term Care Ombudsmen are advocates for residents of long-term care facilities. The California Long-Term Care Ombudsman Association (CLTCOA) is a membership organization composed of the state's 35 local Long-Term Care (LTC) Ombudsman Programs. Working

under the Office of the State LTC Ombudsman within the California Department of Aging, the Programs' state-certified staff and volunteers are responsible for resolving resident complaints, investigating reports of abuse and neglect, and ensuring both quality of care and quality of life in over 8,000 LTC facilities for older and dependent adults across the state. In California, LTC Ombudsmen are also statutorily mandated to witness the signing of any health care power of attorney signed in a long-term care facility after confirming the resident has sufficient capacity to sign.

The National Consumer Voice for Quality Long-Term Care

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) was formed as NCCNHR (the National Citizens' Coalition for Nursing Home Reform) in 1975 due to public concern for substandard care in nursing facilities. The Consumer Voice has since become the leading national voice representing consumers in issues relating to long-term care and is the primary source of information and tools for consumers, families, caregivers, ombudsmen, and other advocates to help ensure quality care for all residents. Consumer Voice is dedicated to advocating for quality care, quality of life, and protection of rights for all individuals receiving long-term services and supports.

How the Proposed *Amicus Curiae* Brief Will Assist the Court

This appeal addresses the authority of a health care agent to enter into a binding pre-dispute arbitration agreement with a nursing facility. Put

simply, Appellants argue that the decision to enter into an arbitration agreement is a decision that a health care agent has authority to make; Respondents argue that a health care agent does not have such authority.

The proposed *amicus* brief puts these arguments in context. First, the proposed brief examines the arguments in this case as they relate to the autonomy of older Californians. The autonomy of older adults should not diminish due to age or age-related challenges. Respecting the autonomy of older adults is a guiding principle in many public policy contexts, including federal long-term care policy. In this case, Appellants' expansive reading of Mr. Logan's health care power of attorney ignores Mr. Logan's expressed wishes and undermines his autonomy. Further, the proposed brief describes how Appellants conflate health care powers of attorney and general powers of attorney, and that their attempt to equate a health care agent with an agent negotiating for state employees is flawed.

Second, the proposed brief provides historical context about the origin of health care decision-making instruments. The historical context underscores the narrow construction of health care powers of attorney. Health care decision-making instruments first applied to a narrow range of end-of-life related health care decisions. Later, the health care power of attorney was created by statute to apply to health care decisions. Further, the proposed brief highlights an important difference between health care and general powers of attorney and describes how carefully crafted

procedural safeguards in health care powers of attorneys are inconsistent with a decision to bind a principal to arbitration.

SUMMARY OF ARGUMENT

Appellants seek to transform the health care power of attorney into an expansive delegation of authority equivalent to a general power of attorney. Appellants' lax reading of Charles Logan's explicit delegation of authority in his health care power of attorney devalues his autonomy and the autonomy of other older Californians. Honoring Mr. Logan's autonomy requires following his explicit instructions and extending his nephew and health care agent Mark Harrod's authority only over matters falling under the authority of the health care power of attorney, since Mr. Logan delegated no other authority.

The historical underpinnings of health care powers of attorney underscore that health care agents only have limited authority. Health care decision-making instruments originated with the living will, which only delegated health care decisions related to end-of-life care. Later, powers of attorney were adapted to the health care context through state law, thus creating the statutory health care power of attorney. Health care powers of attorney have several procedural safeguards distinct from general powers of attorney because health care agents have authority over consequential health care decisions such as declining artificial life-sustaining treatment. Appellants conflate general and health care powers of attorney by reading

Mr. Logan's health care power of attorney as an expansive instrument that delegates legal decision making such as the authority to enter into a binding arbitration agreement. However, Mr. Logan did not execute a general power of attorney and appointed his nephew, Mr. Harrod, only for the purposes of making health care decisions pursuant to a health care power of attorney.

ARGUMENT

I. OLDER CALIFORNIANS' AUTONOMY IS RESPECTED BY HONORING THE DISTINCTION BETWEEN GENERAL POWERS OF ATTORNEY AND HEALTH CARE POWERS OF ATTORNEY.

Personal autonomy is essential, in life and in law. In general, adults have the right to make decisions for themselves. These decision-making rights include the right to appoint an agent so that if, in the future, the adult is unable to make personal decisions, the agent can step in to make those decisions, consistent with the adult's instructions and preferences.

The value of personal autonomy does not diminish with age or with age-related health challenges. *Amici* work to protect the autonomy of older Americans, and see these principles honored appropriately in a variety of contexts. One example — and one particularly relevant to persons like Mr. Logan — is federal long-term care policy. Originally, Medicaid-funded personal care services (e.g., assistance with dressing, bathing, etc.) were provided and directed almost exclusively by commercial agencies; now,

however, the older adult is more likely to make decisions themself. (*See, e.g.*, Hermer, *Rationalizing Home and Community-Based Services Under Medicaid* (2014) 8 St. Louis U.J. Health L. & Pol'y 61, 71-72.) Under "self-directed" Medicaid-funded services, the older adult "exercises choice and control over the budget, planning, and purchase of self-directed personal assistance services, including the amount, duration, scope, provider, and location of service provision." (42 U.S.C. § 1396n(A)(5)(j).)

In nursing facilities, similarly, a resident "participate[s] in the development and implementation of his or her person-centered plan of care," and the facility provides care in accordance with professional standards, "the comprehensive person-centered care plan, and the resident's choices." (42 C.F.R. §§ 483.10(c)(2), 483.25.) Under the required "person-centered care," the facility must "focus on the resident as the locus of control and support the resident in making their own choices and having control over their daily lives." (42 C.F.R. § 483.5.)

In the context of this litigation, honoring autonomy requires focusing on Mr. Logan's explicit instructions. He executed a health care power of attorney, including a list of various decisions entrusted to his health care agent, Mr. Harrod. Also, Mr. Logan did *not* execute a general power of attorney, and thus did not grant Mr. Harrod authority to make decisions beyond the authority granted in the health care power of attorney.

Appellants, however, take a lax attitude towards Mr. Logan and his choices, devaluing his autonomy and the autonomy of other older Californians. This laxness recurs in the Reply Brief as Appellants show little interest in distinguishing between health care powers of attorney and general powers of attorney, and the agents appointed under each.

Most conspicuously, Appellants state baldly that "[a]n 'agent' is an agent," attempting to equate a health care agent with an agent negotiating for state employees' health care coverage. (*See* Reply Br. at 14; *Madden v. Kaiser Found. Hosps.* (1976) 17 Cal. 3d 699.) (state employees bound to arbitration). Contrary to Appellants' arguments, the issue here is not whether someone "place[s] greater trust and confidence" in a family member or in an agent negotiating for health care coverage. (*See* Reply Br. at 14.) The question, rather, is "What did Mr. Logan decide?" Based on the documents in evidence, he chose to appoint Mr. Harrod, his nephew, as his health care agent, but did not choose to give his nephew authority over legal decisions such as whether to waive his right to jury trial and commit himself to arbitrating disputes. By focusing on supposed trustworthiness, Appellants devalue individual autonomy and decision-making, replacing them with the lazy proposition that someone's "immediate family member" should have the authority to commit the person to arbitration. (*Id.*)

Appellants similarly elide the distinction between a health care power of attorney and a general power of attorney in their argument III,

asserting that "It is 'Proper and Usual' for an Agent to Bind a Principal to an Arbitration Agreement Under a Power of Attorney." (Reply Br. at 17.) In this section, Appellants refer throughout to a "power of attorney" and cite California law for general powers of attorney. (*See* Reply Br. at 17; Prob. Code § 4450.) But, of course, Mr. Logan did not execute a general power of attorney and appointed his nephew, Mr. Harrod, only for the purposes of making health care decisions. This choice by Mr. Logan should be respected by extending Mr. Harrod's authority only over matters falling under the authority of the health care power of attorney, since Mr. Logan delegated no other authority.[1]

II. THE EVOLUTION OF STATUTORILY CREATED HEALTH CARE POWERS OF ATTORNEY MAKE PLAIN THAT POWERS DELEGATED TO HEALTH CARE AGENTS ARE SPECIFICALLY LIMITED TO HEALTH CARE DECISIONS.

Appellants disregard the relatively narrow nature of the powers delegated to Mr. Harrod, conflating the powers of a health care agent with the powers delegated to an agent by a general power of attorney. There are two types of subject-matter-specific durable[2] powers of attorney: a health

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[1] Furthermore, the health care power of attorney granted no authority to commit Mr. Logan to arbitration. Because federal law and California law prohibit a nursing facility from requiring arbitration as a condition of admission, a decision to admit someone to a particular nursing facility is unrelated to a decision to arbitrate personal injury actions against the facility. (42 C.F.R. § 483.70(n)(1); Health & Saf. Code § 1599.81(a).)

[2] A "durable" power of attorney remains in effect even if and after the principal loses decision-making capacity.

care power of attorney (also referred to as an advance directive) and a general power of attorney. A general power of attorney is rooted in common law and generally delegates broad financial, property, and legal powers to the agent. (James, *Planning for Incapacity: Helping Clients Prepare for Potential Future Health Crises* (2017) 9 Est. Plan & Cmty Prop. L.J. 227, at 238–39.) A health care power of attorney is statutorily created and delegates only the power to make health care decisions to an agent. Here, Mr. Harrod only had the limited authority through a health care power of attorney to make health care decisions on behalf of Mr. Logan, and did not have the broad authority to make legal decisions on Mr. Logan's behalf.

A. The Historical Evolution of Health Care Powers of Attorney Underscores that Decisions Delegated to Health Care Agents are Limited in Scope.

Appellants advance an expansive authority of health care agents that is at odds with the historical underpinnings of health care powers of attorney. The history of health care decision-making instruments demonstrates that health care powers of attorney have always been construed narrowly to only apply to health care decisions.

Initially, health care decision-making instruments applied only to a narrow subset of health care decisions related to withholding or withdrawing life-sustaining treatment for terminal conditions. (Sabatino, *The Evolution of Health Care Advance Planning Law and Policy* (2010)

Millbank Q., Vol. 88, No. 2, at 212–14). The concept of health care decision making instruments started with the "living will," first proposed in 1967. (*Id.* at 211–12.) Applying the doctrine of informed consent to end-of-life decisions, the living will allowed terminally-ill patients who were receiving life-sustaining treatment the right to consent to or refuse that treatment. (Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations* (2012) Utah. L. Rev. 1329, 1337.) The first living will statute in the country was adopted by California in 1976 with the passage of the Natural Death Act, with 41 states enacting living will statutes in the late 1970s and 1980s. (*Id.* at 1337–38.) Notable court cases from this era also underscored the importance of health care decision-making instruments that stated an individual's expressed health care wishes before they lost capacity to make those decisions. (*See Cruzan v. Director, Missouri Department of Health* (1990) 497 U.S. 261.) (upholding Nancy Cruzan's right to refuse life-sustaining treatment through her parents but determining that states could require a "procedural safeguard" to ensure that the refusal of life-sustaining treatment was Ms. Cruzan's expressed wish before her incapacity).

Over time, policy makers recognized the limitations of living wills, including the limited range of end-of-life health care decisions covered and the absence of an enforcement mechanism if the principal lacked capacity. (Sabatino, *supra*, at 214.) In response, states adapted the general power of

attorney to the health care context, creating the health care power of attorney. (*Id.*) Although the health care power of attorney went beyond the limited scope of living wills, the decisions delegated under health care powers of attorney were still limited to aspects of medical treatment and health care decisions. (Dayton, *supra*, at 1337–38). Health care powers of attorney were conceived as narrowly construed instruments that applied to health care decisions, and do not delegate authority to agents for all purposes (as Appellants contend).

B. Expanding the Authority of Health Care Agents Would Be Inconsistent with Health-Care-Specific Procedures for Health Care Powers of Attorney.

Health care powers of attorney differ from general powers of attorney in procedural safeguards. These procedures respond to the reality that health care agents have power to make consequential personal health care decisions such as refusing artificial life-sustaining treatment. (Sabatino, *supra*, at 214.) The development of health care powers of attorney attempted to address the lack of procedural safeguards and "reflected an attempted balancing between private, flexible decision making and possible abuses of the power" in making health care decisions. (Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy, Department of Health & Human Services, Advance Directives and Advance Care Planning: Report to Congress (Aug. 2008), at 10.) Accordingly, it is commonplace for state

statutes to require health-care-specific procedural safeguards for health care powers of attorney, including requiring that health care power of attorney forms include a "values history" assessment or "instructions for end of life care," which allows principals to articulate "overarching beliefs" from which agents can determine how a principal would wish to proceed with a particular treatment. (Nachman, *Living Wills: Is It Time to Pull the Plug?* (2010) 18 Elder L.J. 289.)

In California, such procedures are seen in the statutory advance health care directive form. (Prob. Code § 4701.) The "Explanation" section of the document explains that, absent instructions to the contrary, the agent will have authority to choose or reject treatment, choose health care providers, approve or disapprove surgical procedures, accept or withhold artificial nutrition or other life-sustaining treatment, donate organs post-death, or authorize an autopsy. In accord, the statutory form solicits the principal's instructions on these important issues, including specific options for end-of-life decisions, relief from pain, and organ donation.

The health-care-specific procedural protections provide more authority to reject Appellants' an-agent-is-an-agent reasoning. Appellants pay little heed to the important differences between a general and health care power of attorney, reading Mr. Logan's health care power of attorney as an expansive delegation of authority to commit Mr. Logan to arbitration. Such a reading conflicts with the text of the Mr. Logan's health care power

of attorney itself, and is inconsistent with the various health-care-specific procedural protections for health care powers of attorney.

CONCLUSION

For the reasons described above, *Amici* respectfully urge the Court to affirm the decision below.

Dated: June 5, 2023

Respectfully submitted,

By: */s/ Eric M. Carlson*

Eric M. Carlson
JUSTICE IN AGING

William Alvarado Rivera
AARP FOUNDATION

Attorneys for Proposed
Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 3,110 words, excluding the Tables of Contents and Authorities, and the Application. The brief uses Times New Roman 13-point font. In making this word-count certification, I have relied on the Microsoft Word program used to prepare the brief.

Dated: June 5, 2023

JUSTICE IN AGING

By: /s/ *Eric M. Carlson*
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Attorney for Proposed
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PROOF OF SERVICE

I am employed in the County of Los Angeles, California by Justice in Aging. I am over the age of eighteen years and not a party to the within action; my business address is 3660 Wilshire Boulevard, Suite 718, Los Angeles, California 90010.

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/s/ *Eric M. Carlson*
Eric M. Carlson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S276545**
Lower Court Case Number: **B312967**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/5/2023

Date

/s/Eric Carlson

Signature

Carlson, Eric (141538)

Last Name, First Name (PNum)

Justice in Aging

Law Firm