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.

APPELLANTS' CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS

Review of a Judgment by the Court of Appeal,
Second Appellate District, Division Four (B312967)
(Los Angeles County Super. Ct. No. 20STCV 26536)

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to California Rules of Court rule 8.520(f)(7), defendants and appellants Country Oaks Partners, LLC, dba Country Oaks Care Center, and Sun Mar Management Services, Inc. (collectively Country Oaks or appellants) submit this consolidated answer to the following amici curiae briefs filed in support of the parties:

> Brief of Amici Curiae Consumer Attorneys of California, Compassion & Choices, American Association for Justice, and Public Justice in support of respondent (filed June 14, 2023) ("CAOC Br.");

Brief of Amici Curiae California Medical Association, California Dental Association and California Hospital Association in support of appellants (filed June 14, 2023) ("CMA Br.");

Brief of Amicus Curiae California Association of Health Facilities in support of appellants (filed June 14, 2023) ("CAHF Br.") and related request for judicial notice (filed June 1, 2023 – specific legislative and regulatory documents are referenced by Exhibit No. as "RJN Ex. __");

Brief of Amici Curiae AARP, AARP Foundation, Justice in Aging, California Advocates for Nursing Home Reform, California Long-Term Care Ombudsman Association, The National Consumer Voice for Quality Long-Term Care (filed June 14, 2023) ("AARP Br.");

Brief of Amici Curiae The Association of Southern California Defense Counsel and Civil Justice Association of California (filed June 27, 2023) ("ASCDC-CJAC Br.")

Amici curiae supporting respondent Charles Logan ("respondent") maintain that the enactment of the Health Care Decisions Law (hereafter HDCL) (Prob. Code, § 4600 et seq.) substantially altered almost 50 years of California agency law. Like respondent, AARP and COAC insist that in order to be valid, the advance medical directive must "plainly and directly" state the agent is *empowered* to agree to arbitrate disputes relating to medical care. (CAOC Br. at 21; AARP Br. at 14, 17.)

And like respondent, his amici are mistaken as a matter of law. *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 (*Madden*) holds 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 p. 709.) Numerous published California decisions before and since the enactment of the HCDL follow *Madden's* sound rationale; the Court of Appeal's opinion in this case is the only outlier.

Next, amici contend that because Health & Safety Code section 1599.81 "decouples" an agreement to arbitrate from the process of admitting the patient to a health facility, the Legislature thereby intended to foreclose an agent acting under an advance directive from agreeing to arbitrate disputes with that chosen medical provider. (CAOC Br. at 22.) Neither the plain meaning of the statute nor common sense support that argument. Whether the proposed agreement arbitrate had been presented to Mr. Logan personally, or to his agent under an advance directive *after* his admission to Country Oaks, appellants complied to the letter with the requirements of section 1599.81.

Amici for respondent also studiously ignore the application of the Federal Arbitration Act (FAA). Assuming the Legislature di actually "intend" to change decades of California agency law by adopting the "clear-statement" rule they assert should apply to this agreement with a nursing home, such a rule would be preempted as impermissibly "disfavoring" arbitration contracts. A point aptly made by other amici as discussed at length below.

ARGUMENT

I

Madden and its progeny carefully accounted for the patient's "autotomy" when defining the agent's authority under an advance directive to consent to arbitrate disputes with the chosen health care provider

CAOC and AARP's briefs argue that the authority of the agent appointed under an Advance Health Care Directive by an incapacitated person must account for the "personal autonomy" of the patient. (CAOC Br. at 14-15; AARP Br. at 13-14.) "Autonomy," according to amici, means doing what the principal would have wanted to do for themselves. (CAOC Br. at 16.) *Madden* and its progeny specifically addressed that notion of "autonomy" – by consistently applying sound principles of California agency law.

As *Madden* reasoned, under the law of agency a representative who is appointed to negotiate health care arrangements is imbued by his or her principal with the "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.'" (*Madden*, *supra*, 17 Cal.3d at p. 706.)

Madden pointed to specific examples in which an agent exercises that power for an incapacitated or incompetent

principals (e.g., minors or other dependent persons) who are unable to make such decisions on the resolution of disputes arising out of the care provided on their own account:

> The authority of an agent to agree to the arbitration of such claims finds an illustration in our decision in *Doyle* v. *Giuliucci* (1965) 62 Cal.2d 606 ..... In an unanimous opinion authored by Chief Justice Traynor, we 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*." .... Rejecting the contention that the arbitration clause unreasonably limited the minor's rights, we replied, "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 supra*, 17 Cal.3d at pp. 708-709 (italics added, internal citations omitted).

During the intervening five decades, California courts have upheld the power of agents acting under an advance directive to agree to the method of dispute resolution relating to those health care decisions which the principal explicitly appointed them to make. This includes the power to enter into agreements to arbitrate as logical part of the health care decision-making process.

The "'proper and usual' nature of selecting arbitration [is recognized] as part of an agent's selection of health care options ...." (*Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 267 (*Garrison*); *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 266 (*Hogan*). Thus, "an agent or fiduciary [such as, the union representative in *Madden* or the parent in *Doyle*] who makes medical care decisions *retains the power to enter into an arbitration agreement*" under the law of agency. (*Id.*; see also CMA Br. at 7; CAHF Br. at 16-20; ASCDC-CJAC Br. at 14-15.) No additional "clear-statement" of the agent's authority to agree to that "form" of dispute resolution is required; particularly in connection with an agreement to arbitrate governed by the FAA. (*Kindred Nursing Ctrs. Ltd. v. Clark* (2017) 581 U.S. 246, 248, 252 (*Kindred*); ASCDC-CJAC Br. at 24-26 and discussion in section III, *infra*.)

As *Garrison* aptly noted, "Probate Code section 4688 clarifies that *if there are any matters not covered by the Health Care Decisions Law*, the law of agency is controlling."" (*Garrison*, *supra*, 132 Cal.App.4th at p. 266, italics added. Accord *Madden, supra,* 17 Cal.3d at pp. 709-710; *Hogan*, *supra*, 148 Cal.App.4th at pp. 266-267, citing *Madden* and *Garrison*.)

Revisions to the HCDL "enacted 43 years after *Madden* was decided" did nothing to alter those principles of California agency law in this context that were being addressed by this court. (See CAOC Br. at 23.) Indeed, none of the cases cited by respondents' amici (all of which *predate* those revisions) stand for the proposition that the HCDL has "narrowed" or fundamentally

changed the authority of an agents acting under an Advance Health Care Directive. (Compare CAHF Br. at 14-22 [nothing in the rulemaking authority of current law precludes a skilled nursing facility to enter into an arbitration agreement with the patient's agent acting under an advance medical directive]; see also RJN Ex. 3 at pp. 14, 20.)

CAOC misplaces reliance on *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 302-303 *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 591 (*Flores*) and *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 376 for the proposition that "next of kin" dd not have the power to bind their relative to arbitration. (CAOC Br. at 21, 25-26.) In those cases, the "next of kin" (usually a family member) *acting as an agent for the patient in the absence* of an advance directive or durable power of attorney to make "health care decisions" did not have the authority conveyed under California agency law. [1]

The *Flores* court observed, "*as a matter of practical necessity* there are certain decisions that must be made for a mentally

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[1] Likewise, "next of kin" cases interpreting *other* provisions of the HCDL , including *Conservatorship of Wendland* (2001) 26 Cal.4th 519 have absolutely no bearing on the authority of an agent to arbitrate health care disputes within the scope of the agency. (CAOC Br. at 21.) *Wendland* addressed whether a conservator had implicit authority to withhold food or hydration. This court required clear and convincing proof of the conservatee's "[d]irections to ... *withhold, or withdraw artificial nutrition and hydration* and all other forms of health care, including cardiopulmonary resuscitation." (*Id.* at p. 540, italics in original text.) That topic is a far cry from agreeing to arbitrate disputes.

incompetent nursing home *patient even when there is no formal representative*." *Flores*, *supra*, 148 Cal.App.4th at p. 593.) In *Madden*, *Garrison* and *Hogan* (as in the present case), the courts were addressing agency principles in which *there is a "formal representative"* whom the patient had appointed in advance to make "health care decisions" on his or her behalf in the event of incapacity. (*Hogan*, *supra*, 148 Cal.App.4th at pp. 266-267.)

This point is well illustrated by more recent decisions interpreting the *current* version of the HCDL in light of *Garrison*, *Hogan* and *Madden*. The question in each of these more recent cases focuses on the agent's authority under the power of attorney in question. For example, *Hutcheson v. Eskaton Fountain Wood Lodge* (2017) 7 Cal.App.5th 937, 945 (*Hutcheson*) recites that "a person who is acting as the patient's agent can bind the patient to an arbitration agreement" provided the advance directive or durable power of attorney includes the authority to make "health care decisions." (Citing *Garrison* and *Hogan*.)

In *Hutcheson,* the patient had signed a health care power of attorney (Prob. Code, § 4671, subd. (a)) appointing her niece to make *health care decisions* for her. Later, the patient signed another "statutory form" general power of attorney as set forth in the Power of Attorney Law (Prob. Code, § 4000 et seq.), which authorized her sister to act for her regarding "personal care" matters, but explicitly excluding health care decisions. The sister, not the niece, entered into an agreement admitting the patient to a skilled nursing facility, and agreeing to arbitrate

disputes arising out of that care. The *Hutcheson* court held the that while the niece would have been empowered to agree to arbitrate disputes, the "personal care" power of attorney in favor of the sister. did not authorize her as the patient's agent to agree to arbitrate. The sister had no authority to make such "health care" decisions. (*Hutcheson, supra*, 7 Cal.App.5th at pp. 945-946 949-950.)

Gordon v. Atria Mgmt. Co., LLC (2021) 70 Cal.App.5th 1020 (*Gordon*) places of all of the above decisions (including those cited by CAOC) into context. *Gordon* involved a "durable power of attorney" signed by the resident of a nursing home (Janet) in favor of her son (Randall). The DPOA expressly *authorized* Randall to act on Janet's behalf. *Held*, Randall was authorized to enter into a "standalone" arbitration agreement with the residential care facility selected to provide Janet's care:

> "[T]he "cases cited by Janet involved situations where, unlike here, a family member had no written power of attorney *at all* . (*Goliger v. AMS Properties, Inc* . (2004) 123 Cal.App.4th 374, 376–377 ....; *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 302 ...; *Flores v. Evergreen at San Diego, LLC (* 2007) 148 Cal.App.4th 581, 587 ....) Here, Randall had Janet's DPOA, and nothing in the cases cited by Janet suggests the DPOA was insufficient to authorize Randall to enter into an arbitration agreement on Janet's behalf."
>
> *Gordon*, *supra*, 7 Cal.App.5th at p.1030 (cf. CAOC Br. at 21, 25-26, citing the same cases).

As in the health care "power of attorney" cases discussed in appellants' briefs on the merits, the question under *Madden* is one of "agency." The advance directive that Mr. Logan signed in favor of his nephew Mr. Harrod before being admitted to Country Oaks was sufficient to confer his authority to sign a standalone arbitration agreement entered into after admission. That authority remains a "proper and usual" topic of the agent's health care decision-making. The HCDL does not alter or "narrow" that authority. (CAHF Br. at 14-22; ASCDC-CJAC Br. at 19-20.)

II

The "decoupling" of arbitration agreements from the standard admission agreement as required by Health and Safety Code section 1599.81 enhances, rather than "narrows" the agent's authority

Taking their cue from the Court of Appeal's decision, respondent's amici alternatively contend that the "decoupling" of arbitration agreements as a condition of admission means the agent is not authorized enter into a standalone agreement to arbitrate with the health care provider arising out of that care. (CAOC Br. at 21; *Logan v. Country Oaks Partners, LLC* (2022) 82 Cal.App.5th 365, 373.) Not true.

Whether the standalone agreement required by section 1599.81 is presented to the patient himself (Mr. Logan), or to his proxy under the advance directive (Mr. Harrod), this is a consumer protection provision that is designed to assure the voluntariness of the agreement to arbitrate disputes.

(*Hogan*, *supra*, 148 Cal.App.4th at pp. 267-268; see also CAHF Br. at 23-25.)

Consistent with this statutory mandate, Mr. Harrod executed a separate arbitration agreement with Country Oaks on behalf of plaintiff. (AA 60-62.) He signed this separate document the same day he executed the admission agreement. (AA 62, 133.)

The arbitration agreement provides that any dispute or claim that relates to or arises out of the provision of (or failure to provide) services or health care, including violations of the Elder Abuse and Dependent Adult Civil Protection Act, will be determined by submission to arbitration. (AA 60.) It expressly states, "Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration." (*Ibid*.)

Directly above Mr. Harrod's signature, the agreement states, "By virtue of Resident's consent, instruction and/or durable power of attorney, I hereby certify that I am authorized to act as Resident's agent in executing and delivering of this arbitration agreement." (AA 62.) Directly below Mr. Harrod's signature line, the agreement identifies him as the "legal representative/agent[.]" (*Ibid*.)

There is no legitimate dispute that appellants fully complied with the provisions of section 1599.81 by presenting a separate standalone arbitration agreement to Mr. Harrod for his consideration, spelling out all of the protections required. In the

trial court, as on appeal, Mr. Logan merely argued that Mr. Harrod lacked the implied authority to execute the arbitration agreement. (AA 152-159.)

Compliance with section 1599.81 enhances, rather than "narrows," the enforceability of arbitration agreements regardless of *who* signs them. Again, the issue boils down to "agency." Mr. Harrod properly acted under an advance medical directive executed by Mr. Logan. (See *Garrison, supra,* 132 Cal.App.4th at p. 266; Madden, 17 Cal.3d at pp. 708-709; *Gordon*, *supra*, 7 Cal.App.5th at p.1030; see also ASCDC-CJAC Br. at 22, 29-30; CAHF Br. at 23-25.)

III

The "clear-statement" rule urged by amici for respondent is preempted under the Federal Arbitration Act

Finally, it is also undisputed that the agreement to arbitrate claims arising from the care provided to Mr. Logan is governed by the FAA. (*Logan, supra*, 82 Cal.App.5th at p. 370.)

The supposed necessity of Mr. Logan's advance directive to provide that Mr. Harrod was *specifically* authorized execute an agreement to arbitrate in connection with health care decisions on his behalf was conclusively disposed of by the United States Supreme Court in *Kindred, supra,* 581 U.S. 246. Such a rule, whether the product of a legislative enactment or judicial decree, impermissibly "singles out arbitration agreements for disfavored treatment," and would be preempted by the FAA. (*Id*. at p. 248; *id*. at p. 252, citing *AT&T Mobility LLC v. Concepcion* (2011) 563

U. S. 333, 339, 341-342; see also *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2023) 62 F.4th 473, 486.)

Casting aside decades of agency law that has consistently applied teachings of *Madden* will have undesirable policy consequences as well. Healthcare facilities and medical associations developed the language of these types of advance directives and durable powers of attorney governing healthcare contracts over many years consistent with the rulemaking authority of the HCDL. (CAHF Br. at 23-25; CMA Br. at 8-10.)

Madden and numerous subsequent cases demonstrate "a strong public policy in favor of arbitration" of disputes, including those arising out of healthcare contracts. (*Madden, supra*, 17 Cal.3d at p. 706-708; see also ASCDC-CJAC Br. at 13-14.) The constitutional conflict may be avoided by continuing to adhere to those sound principles. (*Id*. at pp. 23-32.)

CONCLUSION

The sweeping changes to California agency law that respondent's amici assert should be "required" by the HCDL are legally untenable, and would be preempted by the FAA even if they were adopted.

The decision of the Court of Appeal should be reversed with directions to grant appellants' motion to compel arbitration.

Respectfully submitted,

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WORD COUNT CERTIFICATION [CRC 8.504(d)(1)]

Counsel for defendants and appellants hereby certify that Appellant's Consolidated Answer to Amici Curiae Briefs contains 2,946 words, including footnotes, as measured by the Word software program used to create this document.

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(Code Civ. Proc., § 1013a, subd. (3))

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action; my business address is 1000 Wilshire Boulevard, Los Angeles California 90017. On July 27, 2023, I served the **Appellants' Consolidated Answer to Amici Curiae Briefs** on counsel for the interested parties on the SERVICE LIST attached.

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Executed on July 27, 2023, at Los Angeles, California.

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STATE OF CALIFORNIA
Supreme Court of California

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/s/Harry Chamberlain

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