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.

REPLY IN SUPPORT OF PETITION FOR REVIEW

Review Sought 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

Plaintiff and respondent Charles Logan posits three reasons why review should not be granted. None has merit.

ARGUMENT

I

The Court of Appeal's Opinion Conflicts With *Kindred*.

Logan first argues that the Court of Appeal's opinion does not conflict with *Kindred Nursing Centers Ltd. v. Clark* (2107) ___ U.S. ___ [137 S.Ct. 1421] because the opinion "relied on generally applicable law" to conclude that the power of attorney in this case did not include the authority to execute an arbitration agreement. (Ans. at p. 7.) Logan's characterization, like that adopted by the Court of Appeal, turns a blind eye to what actually occurred here.

As *Kindred* instructs, the Federal Arbitration Act "also displaces any rule that covertly … disfavor[s] contracts that (oh so coincidentally) have the defining features of arbitration agreements." (*Kindred, supra*, 137 S.Ct. at p. 1426.) As set forth in the petition for review, and as reflected by cases throughout the country, it is common for nursing homes, skilled nursing facilities, and the like to ask residents and patients to arbitrate disputes arising from their services. (See petn. for review at pp. 8-9.) It is "usual and customary." Nonetheless, the Court of Appeal reached the opposite conclusion, holding that "there is nothing . . . 'necessary or proper and usual' about signing an optional arbitration agreement" in placing a patient into a skilled nursing facility.

(82 Cal.App.5th at p. 373 [typed opn. at p. 10], citing Health & Saf. Code, § 1599.81, subds. a & b and 42 C.F.R. § 483.70(n)(1).) The Court of Appeal's conclusion flies in the face of reality. The opinion demonstrates that it is singling out arbitration provisions in the manner which *Kindred* specifically forbids. At the very least, this issue is of widespread concern in this State and elsewhere, and deserves this court's review.

II

This Court Should Decide Whether the Court of Appeal's Opinion Conflicts With *Madden* and its Progeny.

Logan next argues that the Court of Appeal's opinion does not conflict with *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 because *Madden* is "factually distinguishable." According to Logan, it was "usual and proper" for the agent in *Madden* to agree to an arbitration provision while negotiating a group medical contract only because the parties had "a parity of bargaining strength." (Ans. at p. 8.)

Yet Logan admits there is no evidence one way or the other concerning bargaining strength in this case. (*Id.* at p. 9.) *Madden* is thus not "distinguishable" on this basis.[1] Nor is it distinguishable on the ground the Court of Appeal invoked, i.e., that the arbitration provision in *Madden* was contained in the health care facility's admission agreement whereas the

[1] If the Court of Appeal inferred unequal bargaining power without evidence, it would further demonstrate that the opinion singled out arbitration provisions for disparate treatment, contrary to *Kindred*.

arbitration provision here was in a separate document. (82 Cal.App.5th at p. 373 [typed opn. at p. 9]; see petn. for review at p. 8.)

Other Courts of Appeal, including *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, have followed *Madden*'s logic by "faithfully" applying the principles long articulated by this court about the benefits of arbitration in this identical setting involving an advance medical directive and power of attorney. As *Garrison* held: "[A]n 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. 264, quoting *Madden*, *supra*, 17 Cal.3d at p. 709; accord, *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 266-267 [following the reasoning of both *Garrison* and *Madden*].)

The Court of Appeal's departure from this common sense conclusion here, ostensibly based upon notions of "unequal bargaining power," is not persuasive and is directly refuted by other California and federal court precedents addressing similar questions. For example, a minor or dependent adult with relatively little or no "bargaining power" when his or her appointed guardian enters into health care decisions on their behalf is nonetheless bound by an agreement to arbitrate disputes arising out of that medical care under general agency principles.[2] (E.g., *Bolanos v. Khalatian* (1991) 231 Cal.App.3d

[2] Thus, "[i]f a parent seeks medical treatment and agrees to arbitrate any claims resulting from the treatment, the

1586, 1591 [mother "clearly had the authority to bind her child to arbitrate claims related to medical service for her" (internal citations omitted)]; compare *Hogan v. Country Villa Health Services*, *supra*, 148 Cal.App.4th at p. 262 ["the *decedent had not elected to restrict the powers of the daughter as her agent* so as to exclude the power to enter into arbitration agreements, the *daughter had the power to execute arbitration agreements*" – applying *Madden*] (italics added).)

By the same token, under the FAA, the United States Supreme Court in the years before *Kindred* routinely rejected such "bargaining power" arguments as a "policy" basis for state courts declining to uphold the agent's authority to agree to binding arbitration. In *Marmet Health Care Center, Inc. v. Brown* (2012) 565 U.S. 530, three plaintiffs sued a nursing home for the wrongful death of a family member due to negligent conduct. In each case, a family member of the patient requiring extensive nursing care entered into an agreement with the nursing home on that patient's behalf requiring arbitration of disputes. The West Virginia Supreme Court invalidated the arbitration agreements contained on the

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parent's children would also need to arbitrate any claim resulting from the treatment of the parent. This principle applies to all claims that could arise out of the medical treatment." (Richard A. Bales & Matthew Miller-Novak, *A Minor Problem with Arbitration: A Proposal for Arbitration Agreements Contained in Employment Contracts of Minors* (2013) 44 McGeorge L. Rev. 339, 349; see also *id.* at pp. 348-349 & fn. 89-96; article available at: https://scholarlycommons.pacific.edu/mlr/vol44/iss2/4

entrance applications due to a state policy against the arbitration of such claims. The United States Supreme Court vacated the West Virginia ruling on grounds that state courts cannot permissibly apply a policy that specifically targets the enforceability of an arbitration agreement, and the reasons given for refusing to arbitrate were therefore preempted by the FAA. (*Marmet supra*, 565 U.S. 530, 532-533 [the FAA "requires courts to *enforce the bargain of the parties to arbitrate*" (italics added)].)

The supposed "unequal bargaining power" of the patient who has appointed an agent is not a viable basis to avoid this agreement under the FAA. Voluntarily appointing an agent to make health care decisions under an advance medical directive, if anything, demonstrates a far greater degree of "bargaining power" than in *Madden* and other examples discussed above. Failing to recognize the appointed agent's authority to contract for the method of dispute resolution in connection with health care issues, by definition, is unduly antagonistic to arbitration.

The Court of Appeal's opinion cannot be reconciled with the above cases. Contrary to Logan's arguments, the Court of Appeal did not "faithfully apply" *Madden* or the FAA; at the very least, this court should clarify how the principles in *Madden* apply to the agent under an advance medical directive and power of attorney like the one presented here.

III

This Case is the Proper Vehicle to Resolve the Split of Authority in California Consistent With the FAA.

Finally, Logan argues that this case is a "poor vehicle" to resolve the conflict among the Courts of Appeal because there is a 19-day time gap between initial admission and execution of the arbitration provision. At best, this "fact" poses a distinction without a difference. Either the advance medical directive and power of attorney authorize the agent to enter into binding agreements to arbitrate disputes arising out of the medical care or they do not. The above authority (including *Madden* and the FAA) uphold the enforceability of arbitration contracts entered into by the agent. The timing of the agreement is superfluous.

But according to Logan, "[t]his unusual fact has the potential to create confusion as to whether the timeliness of executing an arbitration agreement is a determinative factor in deciding whether such was a "health care decision." But Logan never explains how such "confusion" could occur, nor can he. This court routinely formulates or clarifies rules of general application; this case would be no different.

The real "confusion," as aptly pointed out by prominent California medical associations, results from the haphazard and arbitrary refusal to acknowledge the agent's authority to enter into arbitration agreements and by allowing this split of authority to continue in conflict with the governing principles of the FAA. (Cal. Medical Assn., Cal. Dental Assn. and Cal. Hospital Assn. (Oct. 26, 2022) rule 8.500(g) letter at pp. 4-7.)

Logan maintains that, somehow, the above split of authority might not continue to develop. (Ans. at p. 10.) Nonsense. *Madden* and two Court of Appeal decisions go one way and two go another. The law in this area is unsettled where similar contracts are made every day. This is a classic split of authority which only this court is empowered to resolve.

CONCLUSION

The need for review is clear, and Logan fails to demonstrate otherwise. The petition reveals the stark split of authority in this State, and how the result reached by the Court of Appeal is antagonistic to the enforceability of arbitration agreements in violation of the FAA according to *Kindred* and numerous cases that apply its reasoning.

This case presents important questions of constitutional dimension requiring resolution. The court should therefore grant review and conclusively address them.

Respectfully submitted,

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

Counsel for defendants and appellants hereby certify that this reply contains 1,587 words as measured by the word processing software program used to create this document.

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/s/ Raquel Moreno
Raquel Moreno

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S276545**
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