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Supreme Court of California
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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.

OPENING BRIEF ON THE MERITS

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

BUCHALTER, A PROFESSIONAL CORP.
Harry W.R. Chamberlain II (No. 95780)
Robert M. Dato (No. 110408)
1000 Wilshire Blvd,, Suite 1500
Los Angeles, CA 90017
Telephone: 213.891.0700
hchamberlain@buchalter.com
rdato@buchalter.com

SUN MAR MANAGEMENT SERVICES
Julieta Y. Echeverria (No. 315740)
Brittany A. Ortiz (No. 305775)
3050 Saturn Street, Suite 101
Brea, CA 92821
Telephone: 714.577.3880
jecheverria
@sunmarhealthcare.com

Attorneys for Defendants and Appellants
COUNTRY OAKS PARTNERS, LLC
dba COUNTRY OAKS CARE CENTER and
SUN MAR MANAGEMENT SERVICES, INC.

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INTRODUCTION AND ISSUES FOR REVIEW

This court has granted review of the following issues:

1. Should this court resolve the conflict between the Court of Appeal's opinion here and the opinions in *Garrison* [*v. Superior Court* (2005) 132 Cal.App.4th 253] and *Hogan* [*v. Country Villa Health Services* (2007) 148 Cal.App.4th 259], as to whether an advance health care directive and power of attorney encompass an agreement to arbitrate disputes, including whether the Court of Appeal's opinion conflicts with this court's decision in *Madden* [*v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699]?

2. Should this court resolve the conflict between cases like the Court of Appeal's opinion here and *Kindred* [*Nursing Centers Ltd. v. Clark* (2107) 581 U.S. 246], which held that arbitration agreements cannot be singled out for disfavored treatment?

Defendants and appellants Country Oaks Partners, LLC, dba Country Oaks Care Center, and Sun Mar Management Services, Inc. (collectively Country Oaks) submit that an advance health care directive and power of attorney encompass an agreement to arbitrate disputes. If a person who later becomes incapacitated empowers another person to make life and death decisions, it surely encompasses the far less significant decision to arbitrate a dispute with a health care provider. Such a holding would obviate the need for this court to address the second issue. Should this court reach the second issue, the Court of Appeal's opinion (and others) cannot be

reconciled with *Kindred*'s analysis of impermissible restrictions on arbitration agreements that are preempted under the Federal Arbitration Act, and those cases should be disapproved.

STATEMENT OF FACTS

Plaintiff Charles Logan executed an advanced health care directive, "Including Power of Attorney for Health Care Decisions" ("Directive"), that appointed his nephew, Mark Harrod, as his agent to make health care decisions for him. {AA 53-58}[1] The Directive is a form that appears to have been provided with the California Medical Association's "Advanced Health Care Directive Kit." {AA 53}

The Directive provides that Harrod's authority triggers when Logan's primary care physician determines he can no longer make his own health care decisions.[2] {AA 55} The document states in relevant part:

> If my primary physician finds that I cannot make my own health care decisions, I grant my agent full power and authority to make those decisions for me, subject to any health care instructions set forth below. My agent will have the right to:
>
> A. Consent, refuse consent, or withdraw consent to any medical care or services, such as tests, drugs, surgery, or consultations for any physical or mental condition. This includes the provision, withholding or withdrawal of artificial nutrition and hydration (feeding by

[1] AA refers to Appellants' Appendix; "RT" refers to the Reporter's Transcript on Appeal.

[2] This is also referred to as a "springing" health care directive.

tube or vein) and all other forms of health care, including cardiopulmonary resuscitation (CPR).

B. Choose or reject my physician, other health care professionals or health care facilities.

C. Receive and consent to the release of medical information.

D. Donate organs or tissues, authorize an autopsy and dispose of my body, unless I have said something different in a contract with a funeral home, in my will, or by some other written method.

{AA 55}

The Directive also stated that "your agent must make health care decisions believe[d] to be in your best interest, considering your personal values to the extent they are known." {AA 55} The Directive was signed by Logan and notarized in July 2017. {AA 56-57}

Two years later, when he was 76, Logan was admitted to Country Oaks Care Center ("Country Oaks"), a skilled nursing facility, to assist in recovery from a right femur fracture he suffered in a fall. {AA 16, 82-83} His other diagnoses included cardiomegaly, hypertension, acute kidney failure, "other lack of coordination," difficulty walking, and an unstageable sacral pressure ulcer. {AA 82-83, 85}

Logan alleged that when he was admitted to the facility, Country Oaks employees assessed his ability to independently ambulate, feed himself, and use the toilet. {AA 15-16} They determined that he could not independently perform any of

these tasks, which necessitated assistance from the facility. {*Ibid*.} Logan alleged that Country Oaks was obligated to assist him with his toileting and hygiene needs every two hours and as needed. {AA 17} He further alleged that the staff determined he was at high risk of falls.

Upon his admission to the facility, Logan identified Harrod as his power of attorney for health care, emergency contact, and next of kin. {AA 82, 127, 135} Logan granted signatory authority to Harrod for various documents, as follows:

> I, Logan … am able to sign for myself but would like to authorize Harrod … to sign the following documents on my behalf[:]
>
> _√_ Temporary Consent to Treat
> _√_ Advance Directive Acknowledgment
>
> _√_ Influenza Vaccine/Pneumonia Vaccine Consent
> _√_ POLST
>
> _√_ Informed Consent for Use of Device
> _√_ California Admission Packet

{AA 135}

Upon admission to a skilled nursing facility, the patient or his representative must sign a standard admission agreement. (Health & Saf. Code, § 1599.61, subd. (a).) Harrod signed the facility's admission agreement as Logan's "Legal Representative/Agent" on November 29, 2019. {AA 133} He was assisted by Country Oaks' admissions coordinator. {AA 51}

If a skilled nursing facility requests that the patient agree to arbitration, this provision cannot be included in the

standard admission agreement, but must be set forth in a separate document with a separate signature line. (Health & Saf. Code, § 1599.81, subd. (b); 22 Cal. Code Regs. § 72516, subd. (d).) Consistent with this statutory mandate, Harrod executed a separate arbitration agreement with Country Oaks on behalf of Logan. {AA 60-62} He signed the document on 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: "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." {AA 60}

Directly above 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 Harrod's signature line, the agreement identifies him as the "legal representative/agent[.]" {*Ibid.*}

Logan remained at Country Oaks until December 2019. {AA 85} He suffered a fall and his family were unsatisfied with his care. He was discharged to another skilled nursing facility due to his family's dissatisfaction with Country Oaks. {AA 19}

Logan contends he requires extensive assistance when walking and is unlikely to ever walk independently again. {AA 20}

PROCEDURAL HISTORY

Logan filed suit against Country Oaks, Sun Mar Management Services, Inc., and Alessandra Hovey (the administrator of Country Oaks) in July 2020, asserting causes of action for declaratory relief, elder abuse and neglect, negligence, and violation of the Resident's Bill of Rights. {AA 8-27}[3] Harrod was soon appointed as Logan's guardian ad litem.

Country Oaks petitioned to compel arbitration based on the arbitration agreement executed by Harrod. {AA 32-62} After opposition and reply papers were filed, the trial court asked for supplemental briefing on the issue of whether a health care agent may bind his principal to arbitration. {AA 145, 171} The trial court then denied Country Oaks' petition in March 2021. {AA 170-178.} The court held that the Directive only authorized Harrod to make "health care decisions," which do not encompass arbitration agreements with a health care provider. {AA 174} The court also found that execution of the agreement was not part of the "medical decision making process" because it was executed 19 days after Logan was admitted to the facility and the agreement was not a condition of admission. {AA 176} According to the trial court, the authority of the Directive "only extended to the documents necessary to admit Logan …." {*Ibid.*}

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[3] Logan later dismissed Hovey from the case.

The Court of Appeal (2d Dist., Div. Four) affirmed in a published opinion. (*Logan v. Country Oaks Partners, LLC* (2022) 82 Cal.App.5th 365 (*Logan*).) The Court of Appeal refused to follow *Garrison* and *Hogan* and instead followed dicta in *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, concluding that "health care decisions" do not encompass arbitration agreements with a health care provider. This court then granted review.

ARGUMENT

I

The Directive's Provision to Choose Health Care Facilities Encompassed the Power to Consent to Arbitrate Disputes With Such Facilities.

General agency principles as well as the Health Care Decisions Law (Prob. Code, § 4600 et seq.) impact whether the Directive in this case is broad enough to encompass the agent's power to bind the patient to an arbitration agreement requested by a health care provider. As shown below, both these sources of law support the agent's authority.

A. Selecting Arbitration is a Proper and Usual Part of an Agent's Selection of Health Care Options.

Among other broad powers, the Directive in this case authorized Harrod to choose Logan's health care facilities if he was incapacitated. The Court of Appeal held that this power did not include the authority to execute an arbitration agreement that a health care facility requested. That

conclusion is contrary to this court's decision in *Madden* as well as better reasoned Court of Appeal opinions.

In an analogous context, this court in *Madden* held 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." (*Madden, supra,* 17 Cal.3d at p. 709.) The issue in *Madden* was whether the Board of Administration of the State Employees Retirement System (the Board) was authorized to negotiate health plans on behalf of state employees. In that capacity, the Board negotiated a health plan that contained an arbitration clause. This court framed the issue as whether the Board, "as agent of the employees, had implied authority to agree to a contract which provided for arbitration of all disputes, including malpractice claims, arising under that contract." (*Id.* at p. 706.) To resolve the issue, this court relied on Civil Code section 2319, which authorizes a general agent "[t]o do everything necessary or proper and usual … for effecting the purpose of his agency." This court observed that arbitration was a favored method of resolving disputes and that there was a "growing interest in and use of arbitration to cope" with medical malpractice claims. (*Id.* at pp. 707-709.) This court also analogized the situation to *Doyle v. Giuliucci* (1956) 62 Cal.2d 606, which held that the implied authority of a parent to contract for medical services for the parent's minor child "includes the power to agree to arbitration of the child's malpractice claims." (*Madden, supra,* 17 Cal.3d at pp. 708-709.)

There was "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." (*Id.* at p. 709.) As a result, the *Madden* court concluded that "arbitration is a 'proper and usual' means of resolving malpractice disputes, and thus [ ] an agent empowered to negotiate a group medical contract has the implied authority to agree to the inclusion of an arbitration provision." (*Id.* at p. 706.)

In a case identical to the present action in all material respects, the Court of Appeal in *Garrison v. Superior Court, supra,* 132 Cal.App.4th 253, relied on *Madden* in concluding that an attorney in fact under an advance health care directive had authority to bind a patient to an arbitration provision. The patient in *Garrison* designated her adult daughter as her agent under a durable power of attorney for health care. (*Id.* at pp. 257-258.) The daughter signed admission agreements to a residential care facility on her mother's behalf, which agreements provided for arbitration of medical and nonmedical malpractice claims. After her mother's death, the daughter sued on behalf of her mother for negligence, elder abuse, unfair business practices and fraud. In an opinion by Presiding Justice Turner, the *Garrison* court affirmed the trial court's order compelling the parties to arbitrate the dispute.

Garrison began its analysis with what it described as *Madden*'s "black letter statement of California law": "'[A]n agent … 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.'" (*Garrison, supra,* 132 Cal.App.4th at p. 264, quoting *Madden, supra*, 17 Cal.3d at p. 699.) The court then recounted many analogous "scenarios where a person is authorized to bind another to an arbitration agreement in the medical care context …." (*Garrison, supra,* 132 Cal.App.4th at p. 264.)[4] The *Garrison* court realized that "*Madden* involves slightly different facts. But its analysis as to the 'proper and usual' nature of selecting arbitration as part of an agent's selection of health care options is directly pertinent to this case." (*Id*. at p. 267; accord, *Hogan v. Country Villa Health Services, supra,* 148 Cal.App.4th at p. 266 ["an agent or fiduciary who makes medical care decisions retains the power to enter into an arbitration agreement"].)

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[4] *Garrison* cited (among other cases) *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977-978 [employer's agreement may compel employee to arbitrate medical malpractice claims with health care provider]; *Wilson v. Kaiser Foundation Hospitals* (1983) 141 Cal.App.3d 891, 898-900 [child who was unborn at time of prenatal medical malpractice and who does not become member of health plan containing arbitration clause until the time of birth is bound by parent's agreement to arbitrate]; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 66-84 [wife is subject to husband's agreement to arbitrate]; *Michaelis v. Schori* (1993) 20 Cal.App.4th 133, 139 [unmarried father may be compelled to arbitrate when mother executed arbitration agreement while pregnant]; *Harris v. Superior Court* (1986) 188 Cal.App.3d 475, 476-479 [participating physician is bound by medical plan's agreement to arbitrate malpractice disputes with its patients]; *Hawkins v. Superior Court* (1979) 89 Cal.App.3d 413, 415-419 [wife is bound by arbitration provisions in health care plan contract in which her deceased husband had them enrolled].

The Court of Appeal's opinion parts company with this sound principle of "black letter" California law consistently articulated for the past five decades by *Madden* and its progeny (including *Garrison*) creating a clear split of authority. (*Logan, supra*, 82 Cal.App.5th at pp. 372-373.)

The Court of Appeal here held that *Madden*'s discussion of the "proper and usual" scope of an agent's authority does not apply "where the skilled nursing facility's admission agreement does not contain an arbitration provision negotiated between parties of equal bargaining power." (*Logan, supra,* 82 Cal.App.5th at p. 373.) But as noted above, *Madden* relied on *Doyle v. Giuliucci, supra,* 62 Cal.2d 606, which held that a parent could bind his or her minor child to arbitrate child's malpractice claim. Such a situation would involve the same "unequal bargaining power" as the present case. There is no reason to believe that bargaining power was relevant to *Madden*'s holding.

The Court of Appeal also attached significance to the fact that "Country Oaks presented Harrod with a separate document from the admission contract, which contained an optional arbitration agreement. [Citations.] There is nothing, therefore, 'necessary or proper and usual' about signing an optional arbitration agreement 'for effecting the purpose of his agency,' i.e., placing Logan into a skilled nursing facility. Rather, the 'health care decision' (whether to consent to admission into the skilled nursing facility) has been expressly

decoupled from the decision whether to enter into the optional arbitration agreement." (*Ibid.*)

Nothing in *Madden* supports the notion that the result would have been different if the health plan and the arbitration agreement were contained in separate documents. *Madden* (and *Doyle*) are based on the scope of the agency agreements, not the number of documents the agent executed. "Decoupling" here is a distinction without a difference and provides no basis to refuse to follow *Madden*.

B. The Health Care Decisions Law Also Supports an Agent's Authority to Bind a Patient to an Arbitration Clause Requested by a Health Care Provider.

In addition to relying on *Madden*, the Court of Appeal in *Garrison* found support for its holding in the Health Care Decisions Law (Prob. Code, § 4600 et seq.), which was enacted after *Madden* was decided. *Garrison* cited three provisions of the Health Care Decision Law. Probate Code section 4683, subdivision (a) states: "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." 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." Finally, Probate Code section 4688 states: "Where this division does not provide a rule governing agents under powers of attorney, the law of agency applies." (*Garrison, supra,* 132 Cal.App.4th at pp. 265-266.)

The *Garrison* court held that these three provisions authorized Garrison to execute arbitration agreements on behalf of her principal (Needham):

> Garrison executed the arbitration agreements while making health care decisions on behalf of [ ] Needham. *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 decision-making process. Moreover, the durable power of attorney expressly states, "[M]y agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest." [ ] Garrison was granted the authority to choose a health care facility which: does not require arbitration; makes arbitration optional as to some possible disputes, as here, and includes a 30-day time period to cancel the agreements to arbitrate; or absolutely requires the use of arbitration to resolve disputes over care. In this case, [ ] Garrison was authorized to act as [ ] Needham's agent in making the decision to utilize a health care facility which included an optional revocable arbitration agreement. [ ] Garrison was expressly authorized to even determine where [ ] Needham would live. Moreover, Probate Code section 4683, subdivision (b) allows the attorney in fact to "make decisions after the principal's death," which would include how to resolve disputes with the health care provider.

(*Garrison, supra,* 132 Cal.App.4th at p. 266.)

The *Garrison* court interpreted the terms "health care decisions" in the patient's written durable health care power of

attorney to include the decision to enter into an arbitration agreement on behalf of the patient. (*Ibid.* ["At no place does the durable health care power of attorney restrict Ms. Garrison's authority as an agent to enter into an arbitration agreement on behalf of Ms. Needham"].) *Garrison* also recognized that, as a practical matter, it is logical that the person in charge of making health care decisions for another has the authority to deal with all of the paperwork that admission to a health care facility entails.

The *Garrison* court further analyzed the scope of the daughter's authority under Probate Code section 4688, which clarifies that for any matters not covered by the Health Care Decisions Law, the law of agency is controlling. The court thus relied on *Madden* in holding that "[t]he decision to enter into optional revocable arbitration agreements in connection with placement in a health care facility, as occurred here, is a 'proper and usual' exercise of an agent's powers." (*Garrison, supra,* 132 Cal.App.4th at pp. 266-267.)

Here, the Court of Appeal rejected *Garrison*'s reliance on the Health Care Decisions Law. The Court of Appeal first held that "section 4683 merely confers upon the agent the authority to make decisions affecting the principal's 'physical or mental health' to the same extent the principal could make those decisions. The decision to waive a jury trial and instead engage in binding arbitration does not fit within these definitions. It is not a health care decision. Rather it is a decision about how

disputes over health care decisions will be resolved." (*Logan, supra,* 82 Cal.App.5th at p. 372.)

The Court of Appeal's analysis cannot withstand scrutiny. It ignores this court's conclusion in *Madden* that it is "proper and usual" for an agent to select arbitration as part of the selection of health care options. (*Madden, supra*, 17 Cal.3d at p. 706.) It also ignores *Madden*'s observation that "arbitration has become a proper and usual means of resolving civil disputes, including disputes relating to medical malpractice." (*Id.* at p. 714.) Of equal importance, the Court of Appeal's opinion ignores practical reality. If a person authorizes an agent to make life and death health care decisions on his or her behalf, with a mandate to act in that person's best interest, such power *a fortiori* encompasses the comparatively pedestrian decision to choose the forum in which a potential dispute with a health care provider will be resolved.

The Court of Appeal clearly erred in concluding that the Directive did not encompass the power to bind Logan to an arbitration provision. The holding here and the dicta in *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1124 should therefore be disapproved. If this court so holds, the other constitutional issue presented in this case need not be addressed. (*Briggs v. Brown* (2017) 3 Cal.5th 808, 835 [favoring an interpretation that avoids constitutional impairments].)

II

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

If this court were to agree with the Court of Appeal's rationale, then arbitration agreements are singled out for disfavored treatment. This is contrary to the Federal Arbitration Act (FAA) as recently stated by the United States Supreme Court's opinion in *Kindred, supra,* 581 U.S. 246.

The U.S. Supreme Court has held that health care is a form of economic activity involving interstate commerce. (*Summit Health, Ltd. v. Pinhas* (1991) 500 U.S. 322, 329.) Thus, the FAA applies to the type of care that Country Oaks provides, and federal preemption of undue restrictions on arbitration by state regulation is potentially at issue.[5]

Kindred involved a Kentucky state rule that an attorney-in-fact has power to enter an arbitration agreement only if the patient's proxy was specifically granted that authority. The U.S. Supreme Court held that Kentucky's rule was preempted by the FAA because it singled out arbitration contracts for disfavored treatment. The high Court held:

> A court may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their

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[5] The Court of Appeal here acknowledged the interplay between the FAA and its interpretation of California contract law in the first paragraph of the opinion under the heading "Governing Law and Standard of Review." (*Logan*, *supra*, 82 Cal.App.5th at p. 370.)

> meaning from the fact that an agreement to arbitrate is at issue. [Citation.] The FAA thus preempts any state rule discriminating on its face against arbitration …. And not only that: *The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements*.

(*Kindred, supra*, 581 U.S. at p. 251, italics added and internal quotation marks omitted.) The *Kindred* court held that Kentucky could not "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", without placing arbitration agreements on a different plane than other contracts. (*Id.* at p. 252.)[6]

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[6] Since *Kindred* was decided, the Ninth Circuit has taken up the preemption question in the employment context. In *U.S. Chamber of Commerce v. Bonta* (9th Cir. 2021) 13 F.4th 766, a divided panel (in an opinion written by Judge Lucero) initially held that Labor Code section 432.6, which prohibits an employer from forcing a prospective or current employee to "waive any right, forum, or procedure for a violation of any provision" of the Fair Employment and Housing Act, was not preempted by the FAA. In dissent, Judge Ikuta stated: "Like a classic clown bop bag, no matter how many times California is smacked down for violating the [FAA], the state bounces back with even more creative methods to sidestep the FAA." (13 F.4th at p. 782.) Judge Ikuta concluded that section 432.6 "is a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent" and that the original panel opinion would create a split among the federal circuits. (*Ibid.*) On August 22, 2022, the Court of Appeals granted rehearing and vacated the prior opinion, over the dissent of Judge Lucero. The case was still pending at the time this brief was filed.

The Court of Appeal's holding here, directly if not indirectly, "derive[s its] meaning from the fact that an agreement to arbitrate is at issue." (*Kindred, supra,* 581 U.S. at p. 251, cleaned up.) That is because, in the face of the Directive's grant of the "full power and authority" to make all "health care decisions," the court narrowly interpreted the term "health care decision" to mean only "whether to consent to admission into the skilled nursing facility." (*Logan, supra,* 82 Cal.App.5th at p. 373.)

Since *Kindred*, courts throughout the country have held that a power of attorney or advance health care directive similar to that used here empowered the agent to bind an incapacitated patient to an arbitration agreement requested by a health care provider. For example, in *Drummond v. Bonaventure of Lacey, LLC* (2021) 20 Wn.App.2d 455 [500 P.3d 198], the Washington Court of Appeals reversed a trial court's ruling that a decedent's daughter's execution of arbitration agreement was not binding. To hold otherwise would create a constitutional issue:

> If we adopted the interpretation that the Estate suggests[…,] then the FAA would preempt the rule because the FAA displaces a law that "covertly" undermines an arbitration agreement by targeting its defining features. *Kindred*, 137 S. Ct. at 1426. Interpreting [Washington state law] to prohibit certain arbitration agreements because they implicate the right to a jury trial—a defining feature of arbitration agreements, generally — would create the very situation that the *Kindred* Court said was impermissible. *Id*. at 1427. In short, [plaintiff] asks us to adopt an interpretation of the

> statute that would create a preemption problem under the FAA and *Kindred*, which would in turn violate the supremacy clause. If there is an alternative, we cannot choose an interpretation that renders a statute unconstitutional.

(*Id.* at pp. 463-464 [500 P.3d at p. 202]; accord, *Evangelical Lutheran Good Samaritan Soc'y v. Moreno* (D. N.M. 2017) 277 F.Supp.3d 1191, 1231 [under New Mexico law, and citing *Kindred*, "imposing a requirement to inquire into [the patient's] preferences violates the FAA, because it would 'single[ ] out [an] arbitration agreement[ ] for disfavored treatment'"].)

Without explicitly citing *Kindred*, other courts have likewise concluded that a power of attorney or similar document empowers an agent to bind a patient to an arbitration provision with a health care provider, thus avoiding a constitutional issue. (*LP Louisville E., LLC v. Patton* (Ky. 2021) 651 S.W.3d 759, 764-765 [resident's son with power of attorney had the authority to sign the arbitration agreement to obtain resident's admittance into long-term care facility]; *Ingram v. Brook Chateau* (Mo. 2019) 586 S.W.3d 772, 776 [patient's attorney-in-fact had "full authority" to make health care decisions under durable power of attorney, which encompassed her power to execute an arbitration agreement in the nursing home admission contract on patient's behalf].)

Even before *Kindred*, the preemption question was often addressed and seemingly resolved. For example, in *Carter v. SSC Odin Operating Co., LLC* (2010) 237 Ill.2d 30 [927 N.E.2d 1207], the Illinois Supreme Court found that the no-waiver-of-jury-trial provisions of that state's Nursing Home Care Act

were preempted by the FAA and thus could not be used to invalidate an arbitration agreement. Similarly, a California federal district court held that the FAA preempted California law prohibiting any waiver of the right to sue for violation of a resident's rights as the ostensible basis for refusing to arbitrate disputes. (*Valley View Health Care, Inc. v. Chapman* (E.D. Cal. 2014) 992 F.Supp.2d 1016, 1039-1040.)[7] New Jersey's intermediate appellate court found preemption of its state law prohibiting waivers of the right to sue a nursing facility impermissibly contravened enforceability of arbitration agreements. (*Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc.* (2010) 415 N.J. Super. 272, 293 [1 A.3d 806].) And the Georgia Court of Appeals found preemption of a state law requiring that a patient's attorney be present for the signing of any arbitration agreement pertaining to health

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[7] There, the district court permanently enjoined the California Department of Public Health from enforcing provisions of the Patient Bill of Rights that restricted arbitration of disputes in the context of long-term care contracts between residents and providers (Health & Saf. Code, §§ 1430, subd. (b) & 1599.81, subd. (d); 22 Cal. Code Regs., § 72516(d)). Citing the U.S. Supreme Court's pre-*Kindred* precedents on FAA preemption, including *Marmet Health Care Ctr., Inc. v. Brown* (2012) 565 U.S. 530, 533-534: "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." (See *Kindred*, *supra*, 581 U.S. at p. 256 [denial of arbitration as a result of any "erroneous, arbitration-specific rule" is preempted in light of *Marmet*].)

care malpractice. (*Triad Health Mgmt. of Ga., III, LLC v. Johnson* (2009) 298 Ga.App. 204, 209 [79 S.E.2d 785, 790].)

The FAA also preempts a state's court-made law. Accordingly, the New Mexico Supreme Court and the Tenth Circuit Court of Appeals rejected intermediate appellate court decisions declaring that arbitration was a "disfavored" method of resolving disputes, and imposing greater procedural burdens on nursing homes seeking to enforce agreements to arbitrate. (*Strausberg v. Laurel Healthcare Providers, LLC* (N.M. 2013) 304 P.3d 409, 414; *THI of N.M. at Hobbs Center, LLC v. Patton* (10th Cir. 2014) 741 F.3d 1162, 1168 [same].)

The above is just small sampling of cases that have held state laws restricting arbitration of disputes under long-term custodial care contracts are preempted by the FAA. In so doing, these courts have rejected the suggestions made by Logan here that some additional "authority" is required from the patient or resident to arbitrate disputes separate and apart from the Directive. (See *Maide, LLC v. Dileo* (Nev. 2022) 504 P.3d 1126, 1130-1131 [explaining why the FAA preempted Nevada state law requiring that any arbitration agreement in a nursing home contract contain the separate "specific authorization" of the patient or resident].)

The only recent case that swims against the tide of these authorities appears to be *Arredondo v. SNH SE Ashley River Tenant, LLC* (2021) 433 S.C. 69 [856 S.E.2d 550]. In that case, the South Carolina Supreme Court held that an agent was not authorized to sign an arbitration agreement because that

agreement did not concern a property right the patient possessed when the agent signed it. *Arredondo* is distinguishable because the power of attorney in that case did not specifically empower to agent to make health care decisions.[8] That distinction is significant because, as explained above, it is "proper and usual" for an agent to select arbitration as part of selecting health care options. (*Madden, supra*, 17 Cal.3d at p. 706.)

More importantly, however, *Arredondo* is irreconcilable with *Kindred*. The court in *Arredondo* held that the arbitration agreement did not relate to the patient's property rights. (*Arredondo, supra,* 433 S.C. at p. 78 [856 S.E.2d at p. 555], citing the Kentucky Supreme Court's decision on remand in *Kindred Nursing Centers Ltd. Partnership v. Wellner* (Ky. 2017) 533 S.W.3d 189, 194; but see *id.* at pp. 194-199 (dis. opn. of Hughes, J.) [the majority decision is inconsistent with the Supreme Court's mandate in *Kindred*].) But the *Arredondo*

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[8] The power of attorney authorized Arredondo: "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." (*Arredondo, supra,* 433 S.C. at p. 77 [856 S.E.2d at p. 554].)

court did exactly what *Kindred* forbids: it singled out an arbitration provision for disfavored treatment. *Arredondo* is not persuasive and therefore should not be followed. (*Kindred*, *supra*, 581 U.S. at p. 256 [disfavored treatment means application of an "erroneous, arbitration-specific rule"]; *Marmet*, *supra*, 565 U.S. at pp. 533-534.)[9]

This court should avoid a federal constitutional issue if at all possible. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, citing *Crowell v. Benson* (1932) 285 U.S. 22, 62.) This court should therefore interpret California general agency law and the Health Care Decisions Law so that they do not conflict with *Kindred* and the FAA.

CONCLUSION

The Court of Appeal's opinion is contrary to this court's opinion in *Madden* and better reasoned opinions such as *Garrison*. Reversal of the Court of Appeal's decision will avoid a conflict with *Kindred* and the FAA. The judgment of the Court of Appeal should therefore be reversed.

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[9] Compare *Maide, LLC v. Dileo*, *supra*, 504 P.3d at pp. 1130-1131 (FAA preempted Nevada law imposing barriers to arbitration in a nursing home contract entered into under the patient's advance directive); *Drummond*, *supra*, 20 Wn.App.2d at pp. 463-464 [500 P.3d at p. 202] (same result under Washington law after *Kindred*); *Valley View Health Care, Inc. v. Chapman, supra*, 992 F.Supp.2d at p. 1040 (FAA preempted California statutes and regulations restricting the right to arbitrate disputes arising under long-term care agreements, following *Marmet*).

Respectfully submitted,

BUCHALTER, A PROFESSIONAL CORPORATION
Harry W.R. Chamberlain II
Robert M. Dato

SUN MAR MANAGEMENT SERVICES
Julieta Y. Echeverria
Brittany A. Ortiz

Attorneys for Defendants and Appellants
COUNTRY OAKS PARTNERS, LLC
dba COUNTRY OAKS CARE CENTER and
SUN MAR MANAGEMENT SERVICES, INC.

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

Counsel for defendants and appellants hereby certify that this opening brief on the merits contains 5,739 words as measured by the word processing software program used to create this document.

BUCHALTER, A PROFESSIONAL CORPORATION
Harry W.R. Chamberlain II
Robert M. Dato

SUN MAR MANAGEMENT SERVICES
Julieta Y. Echeverria
Brittany A. Ortiz

Attorneys for Defendants and Appellants
COUNTRY OAKS PARTNERS, LLC
dba COUNTRY OAKS CARE CENTER and
SUN MAR MANAGEMENT SERVICES, INC.

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Ayman R. Mourad
Lanzone Morgan, LLP
5001 Airport Plaza Dr., Suite 210
Long Beach, CA 90815-1286
(Attorneys for respondent)
(by electronic service via TrueFiling)

Clerk of the Court for
Hon. Monica Bachner
111 North Hill Street
Los Angeles, CA 90012

Court of Appeal
Second Dist., Div. Four
(through Sup. Ct. e-filing)

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Suzanne Voas Lanzone Morgan LLP 339911	smv@lanzonemorgan.com	e-Serve	1/13/2023 10:50:41 AM
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Signature

Dato, Robert (110408)
Last Name, First Name (PNum)

Buchalter

Law Firm