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

ANSWER BRIEF ON THE MERITS

LANZONE MORGAN, LLP
Ayman R. Mourad (SBN: 304161)
Suzanne M. Voas (SBN: 339911)
5001 Airport Plaza Drive, Suite 210
Long Beach, CA 90815
Telephone: (562) 596-1700
Facsimile: (562) 596-0011
arm@lanzonemorgan.com
smv@lanzonemorgan.com

BRAUNHAGEY & BORDEN LLP
Matthew Borden (SBN: 214323)
Kory J. DeClark (SBN: 310571)
351 California Street, 10th Floor
San Francisco, CA 94104
Telephone: (415) 599-0210
Facsimile: (415) 276-1808
borden@braunhagey.com
declark@braunhagey.com

ATTORNEYS FOR PLAINTIFF AND RESPONDENT
CHARLES LOGAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

OTHER AUTHORITIES

ISSUES PRESENTED

1. Does an Advance Health Care Directive that empowers an agent to make "health care decisions" thereby enable that agent to make the legal decision to bind the principal to a pre-dispute arbitration agreement with a skilled nursing facility, when receiving health care from the facility cannot be conditioned upon agreeing to arbitrate?

2. Is using standard principles of construction to interpret the scope of agency created by the Advance Health Care Directive and the Probate Code's definition of "health care decision" preempted by the Federal Arbitration Act?

Plaintiff/Respondent Charles Logan respectfully submits this Answer Brief.

INTRODUCTION

Charles Logan executed a form entitled, "Advance Health Care Directive Including Power of Attorney for Health Care Decisions," through which he appointed his nephew to make "health care decisions" for him. The Court of Appeal correctly held that the Health Care Directive did not authorize his nephew to enter into an agreement to arbitrate his legal claims against Appellants. Arbitration is a legal decision, not a health care decision, especially where—as here—a skilled nursing facility cannot condition a resident's admission upon agreeing to arbitration.

The plain language of the Advance Health Care Directive covers familiar health care decisions: (1) whether to consent to or refuse medical treatment, food, and hydration, (2) which physicians to use, (3) whether to release medical information, and (4) whether to donate organs. It does not include decisions about what venue legal claims will be brought in or whether to waive the right to a jury trial. In their Opening Brief, Appellants fail to explain how arbitration could somehow be a health care decision, much less how it falls within one of the enumerated delegations of power in the Advance Health Care Directive. Their theory—that because the Advance Health Care Directive includes the power to make life-or-death decisions, it must include lesser powers (App. Br. 7)—would convert the Advance Health Care Directive into a roving power to do anything.

The Advance Health Care Directive is part of the Health Care Decisions Law (Prob. Code, § 4600 et seq.), a detailed statutory scheme enacted to enable people to delegate end-of-life decisions with as much precision and detail as possible. The law expressly defines the choices authorized by the Advance Health Care Directive. Section 4615 defines "health care" to mean "any care, treatment service, or procedure to

maintain, diagnose, or otherwise affect a patient's physical or mental health condition." Section 4617 defines "health care decision" as selecting providers, agreeing to medical procedures, and permitting or refusing medical treatment and nourishment. Neither definition includes agreeing to arbitrate legal claims, and *Garrison v. Superior Ct.* (2005) 132 Cal.App.4th 253—the primary case Appellants rely on—does not even mention these statutes.

Arbitration cannot be a health care decision in the skilled nursing context, moreover, because a facility cannot condition providing health care upon a resident's agreement to arbitrate. (Health & Saf. Code, § 1599.81, subd (a); 42 C.F.R., § 483.70, subd. (n)(1).) For this reason, Appellants' reliance on *Madden v. Kaiser Found. Hosps.* (1976) 17 Cal.3d 699 and its progeny is misplaced. *Madden* held that the statutory power to contract for group health insurance included the ability to negotiate a plan that included mandatory arbitration. In that context, arbitration is routine, and the provision (and cost) of the services depends upon agreeing to it. Mr. Logan, by contrast, was going to receive skilled nursing care from Appellants whether or not he made the legal decision to arbitrate his legal claims.

The plain meaning of "health care decision" is also consistent with the legislative history and structure of the Probate Code—which Appellants fail to address—and resonates with longstanding legal principles, such as that agents are limited to enumerated powers or implied powers necessary to effectuate them, and that delegations of decision-making about health care should be narrowly construed. Applying these principles and basic tenets of interpretation, several other jurisdictions to consider this question have similarly concluded that under their state laws—which are similar to California's—delegating the power to make "health care decisions" does not include the power to execute legal contracts to arbitrate claims.

Defendants' argument based on *Kindred Nursing Centers Ltd. P'ship v. Clark* (2017) 581 U.S. 246, also fails. *Kindred* struck down Kentucky's "clear statement" rule, which prohibited courts from finding a delegation of the power to agree to arbitrate absent an express reference to arbitration. The United States Supreme Court held that this judge-made rule could not be used to avoid broad agency agreements that covered business and litigation decisions because it explicitly targeted arbitration. *Kindred* is inapplicable to the issues here, which concern a straightforward interpretation of the term "health care decision" within the Advance Health Care Directive and under California statutory law. These general state-law legal questions do not single out arbitration.

Far from imposing barriers to arbitration, California law expressly enables a resident to delegate the decision about whether to agree to arbitration via the Durable Power of Attorney form in Probate Code section 4401. Like the powers of attorney at issue in *Kindred*, this form enables the agent to make legal and financial decisions on behalf of the principal. It expressly includes decisions related to "claims and litigation" and "arbitration" and specifically excludes "health-care decisions." In addition to showing that health care decisions exclude legal decisions, section 4401 places the legal decision about delegating authority to enter into arbitration agreements where consumers expect to find it—on a form concerning legal and financial decision making, rather than on one that helps them choose how they will be cared for and whether they will refuse treatment if they can no longer make those decisions themselves.

In sum, Appellants' rule would create an unexpected and substantial waiver of the constitutional rights of hundreds of thousands of Californians who have executed Advance Health Care Directives reasonably believing that they were simply making medical decisions about their end-of-life care.

For each of these reasons, the Court of Appeal's decision should be affirmed, and all contrary decisions, including *Garrison*, should be overruled.

STATEMENT OF THE CASE

A. Mr. Logan Executes an Advance Health Care Directive

In July 2017, Respondent Charles Logan executed an Advance Health Care Directive form, which included a Power of Attorney for Health Care Decisions. (AA 54-58.[1]) He appointed his nephew, Mark Harrod, to be his Health Care Power of Attorney. (AA 54.)

The Advance Health Care Directive form is found in Probate Code section 4701. The form was largely drawn from Section 4 of the Uniform Health-Care Decisions Act of 1993. (See 1999-2000 Annual Report, 29 Cal. Law Revision Com. Rep. (1999) App. 6, p. 678.) The version that Mr. Logan signed (AA 54-58) is substantively similar to the form in Uniform Act section 4, which is substantively similar to the current version in Probate Code section 4701.

Advance Health Care Directive forms have been signed by hundreds of thousands of Californians.[2] The forms are widely available through hospitals, universities, health care organizations, AARP, and other internet sources. The State of California urges consumers to execute them. (See, e.g., <https://oag.ca.gov/consumers/general/care> [California Attorney General website, suggesting to consumers that "[a]fter learning your

---

[1] "AA" refers to Appellants' Appendix.

[2] See, e.g., K. Yadav et al., *Approximately One in Three US Adults Completes Any Type of Advance Directive for End-of-Life Care* (July 2017) Health Affairs, Vol. 36, No. 7, <https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0175> (as of March 15, 2023).

options and discussing your wishes, prepare an Advance Care Directive" and including link to sample section 4701 form].)

The purpose of the Health Care Decision Law, which encompasses the forms, is "to promote the use and recognition of advance directives, to improve effectuation of patients' wishes once they become incapable of making decisions for themselves, to simplify the statutory form and make it easier to use and understand, and to modernize terminology." (Health Care Decisions for Adults Without Decisionmaking Capacity (December 1998) 29 Cal. Law Revision Com. Rep. (1999) p. 12.)

The current statutory form confers five enumerated powers, all of which are related to medical treatment choices. Those are the powers to: "(a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition; "(b) Select or discharge health care providers and institutions; "(c) Approve or disapprove diagnostic tests, surgical procedures, and programs of medication; (d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation; and "(e) Make anatomical gifts, authorize an autopsy, and direct disposition of remains." (Prob. Code, § 4701.)

The form also comes with a description of its purpose and how to fill it out. It explains that it is used to delegate decisions about medical treatment. It states: "You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician." (Prob. Code, § 4701.)

The form further explains: "Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make

health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you even though you are still capable," and "Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief." (Prob. Code, § 4701.)

The form instructs: "Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take responsibility." (Prob. Code, § 4701.)

The Advanced Health Care Directive form Mr. Logan signed provided that if Mr. Logan's primary care physician found that Mr. Logan could not make his own "health care decisions," then Mr. Harrod would have "full power and authority" to make "those decisions" for him, "subject to any health care instructions set forth" later in the document. (AA 55.) The Health Care Power of Attorney enumerated the four rights Mr. Logan granted Mr. Harrod under the instrument:

> 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 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 [elsewhere].

(AA 55.)

B. Appellants' Treatment of Mr. Logan

For two years after executing the Advance Health Care Directive form, Mr. Logan—who was then in his mid-seventies—was living independently. But in November 2019, he fell down at a bus stop, fracturing his right femur. (AA 16, 82.) He received acute treatment at a hospital, then, on November 10, was transferred and admitted to Country Oaks Care Center, a skilled nursing facility in Brea, California, that is owned and operated by Appellants. (AA 82, 126.) No evidence suggests that the facility asked him to complete admission paperwork or sign an arbitration agreement when he was admitted.

Country Oaks understood that Mr. Logan would need considerable care and attention during his rehabilitation. As part of its admissions examination, it found that he suffered from an enlarged heart, hypertension, acute kidney failure, a bone disorder, and a pressure ulcer, which required pressure reducing devices and repositioning every two hours. (AA 16, 82-83.) It also recognized that Mr. Logan was at high risk of trying to satisfy his own needs, and that he would need assistance each time he attempted to move around the facility—when dressing, bathing, using the restroom, and so on—both because he had a fractured femur and because he exhibited a "lack of coordination" and "difficulty in walking" generally. (AA 16-17, 82-83.) To properly care for Mr. Logan, Country Oaks' knew that its staff would need to observe Mr. Logan frequently, anticipate his needs, provide toileting assistance every two hours, and—in compliance with orders from

Mr. Logan's primary physician—provide occupational and physical therapy five days per week for four weeks, and as necessary after. (AA 17-18.)

Country Oaks' failed to provide that care. Although Mr. Logan was not incontinent, Country Oaks diapered him so its staff would not need to take him to the bathroom. (AA 18.) It also provided only half of the physical and occupational therapy his physician ordered. (AA 19.) Due to neglect, Mr. Logan's pressure ulcer worsened, and he developed a second one. (AA 20.)

Country Oaks' inadequate care came to a head on November 13. Late that night, Mr. Logan needed to use the bathroom. He asked for assistance, but staff refused, so he tried to walk to the bathroom on his own. Sometime later, staff found Mr. Logan on the floor, writhing in pain, with his right leg twisted at an unnatural angle. (AA 19.) The next day, the facility transported him to Pomona Valley Hospital Medical Center, where it was discovered that he had fractured his right femur in a second location. After performing surgery on his leg, the hospital's medical team sent Mr. Logan back to Country Oaks with express instructions that the facility provide, among other things, an in-room sitter to prevent additional harm. (AA 19.)

Mr. Logan's family removed him from Country Oaks a few weeks later. (AA 20, 85.) After his fall, Mr. Logan—who is now deceased—required extensive assistance when walking. (AA 20.)

C. The Decisions Below

After leaving the facility, Mr. Logan filed a Complaint against Country Oaks, its parent company, Sun Mar Management Services, Inc., and Alessandra Hovey (the facility administrator, who was later dropped from the case) alleging causes of action for declaratory relief, elder abuse and neglect, negligence, and violations of Health and Safety Code section 1430 (Residents' Bill of Rights). (AA 8-27.) Appellants petitioned to

compel arbitration. (AA 32-66.) They offered two theories in support. First, they argued that the arbitration agreement was valid because Mr. Harrod's authority to sign it was "in full effect" when Mr. Logan was admitted to Country Oaks on November 10. (AA 39). Second, they argued that Mr. Logan orally granted Mr. Harrod authority to sign the arbitration agreement on November 29—when, according to Appellants' first argument, Mr. Logan lacked competence to make such a decision. (AA 117-18, 165-66.)

The Los Angeles Superior Court held that the arbitration agreement was invalid and denied the petition. (AA 162-69.) While Mr. Harrod had authority to make "health care decisions" under the Advance Health Care Directive, the court found, his authority was "limited" to making "the four enumerated types of health care decisions" the Directive specified. (AA 166-67.) Admitting Mr. Logan to a skilled nursing facility fell under that authority, but executing an optional arbitration agreement—particularly one that was presented weeks after Mr. Logan was admitted to the facility—did not. (AA 168.)

The Court of Appeal affirmed. (See *Logan v. Country Oaks Partners, LLC* (2022) 82 Cal.App.5th 365, 369.) Analyzing the "plain language of the Advance Health Care Directive," the Court held that it could not infer that "Harrod had authority to enter into an optional arbitration agreement from the fact he had express authority to make 'health care decisions' and '[c]hoose ... health care facilities,'" neither of which required signing an arbitration agreement. (*Id.* at p. 374.)

Turning to *Garrison*, *supra*, 132 Cal.App.4th 253—one of two primary cases Appellants rely on—the Court of Appeal found its application of the Health Care Decisions Law (Prob. Code, § 4600 et seq.) "unpersua[sive]." (*Logan*, *supra*, 82 Cal.App.5th 365, 371-72.) Contrary to the interpretation in *Garrison*, the relevant sections of the Health Care Decisions Law confer on a health-care agent "the authority to make

decisions affecting the principal's 'physical or mental health,'" not the authority to, among other things, "waive the principal's right to a jury trial," which, additionally, is neither a "necessary" nor "proper and usual" means of "effecting the purpose of [the health-care agent's] agency," which in this instance was to place Mr. Logan in a skilled nursing facility. (*Id.* at p. 372 [quoting Prob. Code, § 4683; Civ. Code, § 2319].)

The court also held that *Madden*, *supra*, 17 Cal.3d 699—the other primary case Appellants rely on—is "inapplicable" here because the arbitration agreement Country Oaks asked Mr. Harrod to sign was not a decision Mr. Harrod was required to make as part of a negotiation with Country Oaks. It was, rather, a freestanding decision that California and federal law have "expressly decoupled" from the purpose of a health-care agent's agency. (*Logan*, *supra*, 82 Cal.App.5th 365, 373.) The court then analyzed both the plain language of the Advance Health Care Directive and the history of the federal regulations prohibiting nursing facilities from requiring arbitration agreements as part of admission. (*Id.* at pp. 373-75.) It held that those sources demonstrate, consistent with the Probate Code, that Mr. Harrod's authority to make "health care decisions" did not authorize him to make an optional, freestanding decision to waive Mr. Logan's right to a jury trial. (*Id.* at pp. 374-75.)

ARGUMENT

I. THE ADVANCE HEALTH CARE DIRECTIVE DOES NOT EMPOWER AN AGENT TO AGREE TO ARBITRATION BECAUSE ARBITRATION IS NOT A "HEALTH CARE DECISION"

The plain language of the Advance Health Care Directive and the language, structure, and legislative history of the Probate Code all confirm that Mr. Harrod's Health Care Power of Attorney did not authorize him to make optional legal decision for Mr. Logan, such as whether to arbitrate any claims he might bring against Country Oaks. Moreover, Appellants'

reliance on *Madden* and *Garrison* is misguided, as *Madden* dealt with a different statutory regime and inapposite circumstances, and *Garrison* misapplied the Health Care Decisions Law. For the reasons Mr. Logan raises here, several states to consider the question have found that a health care power of attorney lacks authority to execute unnecessary arbitration agreements with nursing facilities.

A. The Plain Language of the Advance Health Care Directive Does Not Include the Power to Execute Arbitration Agreements

The plain language of the Advance Health Care Directive Mr. Logan signed is limited to health care decisions. It does not include, among many other things, the power to make legal decisions, such as waiving the right to a jury trial or deciding what forum Mr. Logan may use to resolve legal disputes.

"The scope of a power of attorney depends on the language of the instrument, which is strictly construed." (*Tran v. Farmers Group, Inc*. (2002) 104 Cal.App.4th 1202, 1213.) The Advance Health Care Directive Mr. Logan executed includes a Power of Attorney for Health Care Decisions, which provides the agent—under the section entitled "Authority of Agent"—with four enumerated rights. These are 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 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 [elsewhere].

(AA 55.) Each enumerated power relates to end-of-life choices and medical care. None concerns the venue for legal claims.

Nothing in the form or instructions gives a consumer any reason to believe that they are delegating the power to make legal choices about arbitration of legal claims. The instructions consumers read and follow explain that "This form lets you give instructions about your future health care," and that "[c]hoices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as provision for pain relief." (Prob. Code, § 4701.) They say nothing about arbitration or legal claims.

The Advance Health Care Directive is, by its own terms, limited to decisions about "health care." (AA 55.) While only four pages long, the form uses the terms "health care decisions," "health care desires," and "health care instructions" over a dozen times. (AA 54-57.) The heading on the Directive's first page is also entitled "My Health Care Wishes." (AA 54.) (The same phrase appears on the cover page of the Advance Health Care Directive Kit in which the form appears. (AA 54).) Nothing in the form or instruction kit says anything about legal disputes, resolving legal claims, venue, or anything that would signal to the signatory that they are potentially giving someone the ability to, among other things, waive rights related to litigation or control over how and where legal disputes will be resolved.

"Heath care" is a familiar term. It is means "care for the general health of a person, etc., esp. that provided by an organized health service."[3] This definition—particularly in the context in which the term appears on the Advance Health Care Directsive—plainly does not extend to optional decisions about a signatory's legal matters. (See, e.g., *Moore v. Cal. State Bd. of Acct.* (1992) 2 Cal.4th 999, 1012 ["[A] court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list."].)

Even if there were uncertainty about what "health care decision" means generally, the Advance Health Care Directive in this case expressly enumerates, as noted above, only four types of decisions the "agent will have the right to make" consistent with their agency. (AA 55; *supra* p. 7.) Of these, only the second—whether to "choose or reject … [a] health care facilit[y]"—is potentially relevant here. As the Court of Appeal recognized, however, this language "does not address arbitration agreements or the resolution of legal claims," and so did not authorize Mr. Harrod "to enter into an *optional* arbitration agreement" that had no bearing on Mr. Harrod's decision to choose or reject Country Oaks as a health care facility. (*Logan*, *supra*, 82 Cal.App.5th 365, 374.)

In their Opening Brief, Appellants elide the plain language of the Advance Health Care Directive and offer no interpretation of the contractual language. Under that language, Mr. Logan never delegated the ability to make any decision other than the health care decisions enumerated on the form.

---

[3] "Health care, n." Oxford University Press (March 2023) Oxford English Dictionary Online <https://www.oed.com/view/Entry/85020?redirectedFrom=health+care#eid1876368> (as of March 15, 2023).

B. Whether to Arbitrate is Not A "Health Care Decision" Under the Health Care Decisions Law

The Health Care Decisions Law (Prob. Code, § 4600 et seq.), which includes the Health Care Power of Attorney that is included in the Advance Health Care Directive, is no help to Appellants either. Its plain language, structure, and legislative history confirm that whether to arbitrate is not a "health care decision." (See *Cortiz v. Abich* (2011) 51 Cal.4th 285, 292 ["[W]e look first to the words of the statute, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. Although we give effect to a statute according to the usual, ordinary import of its language, language that permits more than one reasonable interpretation allows us to consider other aids, such as the statute's purpose, legislative history, and public policy."] (internal quotations and citations omitted).)

1. Whether to Arbitrate Is Not a "Health Care Decision" Under the Plain Language and Structure of the Health Care Decisions Law

The plain language of the Health Care decisions law restricts "health care decisions" to decisions about health care. Probate Code section 4683 provides that "[a]n 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." Sections 4617 and 4615 then define the relevant terms: "health care decision" means "a decision … regarding the patient's health care," and "health care" means "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental health condition."

Putting these sections together, a health care power of attorney may make decisions about treatment, a service, or a procedure targeting the

principal's physical or mental health. This includes, for example, "[s]elect[ing] … health care providers," "[a]pprov[ing] … diagnostic tests, surgical procedures, and programs of medication," and instructing medical providers to "provide, withhold, or withdraw artificial nutrition." (Prob. Code, § 4617, subds. (a)-(c).) As the Court of Appeal observed, these provisions of the Probate Code, like the Advance Health Care Directive itself, "say[] nothing … about the agent's authority to agree to enter into an arbitration agreement and thereby waive the principal's right to a jury trial."[4] (*Logan*, *supra*, 82 Cal.App.5th 365, 372.)

The structure of the Probate Code—which Appellants ignore—reenforces the conclusion that the Advance Health Care Directive is not the proper place to authorize an agent to waive legal rights that have no bearing on a principal's medical treatment. Unlike the Health Care Decisions Law (Prob. Code, § 4600 et seq.), which limits the scope of the Health Care

---

[4] California courts have found similar statutory powers to be limited in precisely this way. For instance, under Health and Safety Code section 1418.8, subdivision (c), a nursing home resident's "next of kin" has "legal authority to make medical treatment decisions" when the resident is incompetent. However, courts have held that the "authority to make medical treatment decisions for the patient" does not "translate[] into authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home." (*Pagarigan v. Libby Care Ctr., Inc*. (2002) 99 Cal.App.4th 298, 302; accord *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 594 ["Unlike admission decisions and medical care decisions," which can be made under section 1418.8, "the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a person's well-being."]; *Goliger v. AMS Properties, Inc*. (2004) 123 Cal.App.4th 374, 376 [same].) As courts in other states have observed, it is "unclear" why "the authority to make health care decisions as next-of-kin and the authority to make health care decisions pursuant to a [health care] power of attorney" would be so different that one would "confer[] the authority to sign an arbitration agreement on behalf of another person while the [other would] not." (*Dickerson v. Longoria* (2010) 414 Md. 419, 445 fn. 16.)

Power of Attorney to "health care decisions" (*id*., § 4683), the Power of Attorney Act (*id.*, §§ 4400-4465) provides a "broad and sweeping" "Uniform Statutory Form Power of Attorney" that empowers an agent to make legal decisions (*id.*, § 4401).

This broader power of attorney—which is discussed in section 4401 and provides several subjects for a potential power of attorney—includes an option to empower an agent to handle "[c]laims and litigation." (*Id*., § 4401.) Section 4450 then explains that, for each subject selected (including "claims and litigation"), the principal, by signing the form, "empowers the agent, for that subject, to … [p]rosecute, defend, **submit to arbitration**, settle, and propose or accept a compromise with respect to, a claim existing in favor of or against the principal or intervene in litigation relating to the claim." (*Id.*, § 4401, subd. (d), emphasis added.) At the top of the form is a "Notice," which provides that the power of attorney established through this form "does not authorize anyone to make medical and other health-care decisions for [the principal]." (*Id.*, § 4401.)

It is no accident that sections 4401 and 4701 work hand-in-hand. In 1994, the Legislature repealed the durable power of attorney and health power of attorney provisions in the Civil Code and enacted sections 4401 and 4701 together in the Probate Code as part of a uniform effort to "enact a new comprehensive Power of Attorney Law in the Probate Code" and "replace the incomplete and disorganized collection of power of attorney statutes currently located with the other agency rules in the Civil Code." (Sen. Com., Cal. Bill Analysis on Sen. Bill No. 1907 (1993-1994 Reg. Sess.) May 19, 1994 [Powers of attorney].) By expressly separating the Health Care Power of Attorney (which includes health-care decisions but excludes unrelated legal decisions) and the Uniform Statutory Form Power of Attorney (which includes legal decisions (like arbitration) but excludes

health-care decisions), the Probate Code clearly delineates these categories of decision and places them where consumers expect to find them.

2. The Legislative History of the Health Care Decisions Law Also Shows that Whether to Arbitrate Is Not a "Health Care Decision"

The legislative history of the Health Care Decisions Law and section 4701 further underscores that a delegation of authority under the Advance Health Care Directive is confined to end-of-law medical decisions, not arbitration of legal claims.

The Advance Health Care Directive form comes from the Uniform Health-Care Decisions Act of 1993. (See 1999-2000 Annual Report, 29 Cal. Law Revision Com. Rep. (1999) App. 6, p. 678.) The Uniform Act was promulgated in response to a patchwork of state statutes that dealt with the decision to withdraw medical treatment after a person lost competence. (See U. Law Com., (1993) Health-Care Decisions Act.[5]) The purpose of the Act was to "solve[] both the broader problem of health-care decision-making and the narrower problem of who decides when to withdraw treatment." (*Ibid*.)

Since its enactment, the Advance Health Care Directive and Health Care Decision Law have repeatedly been refined to continue to solve for these two issues and to increase the precision with which surrogate end-of-life health care decisions can be made. (See, e.g., Senate Judiciary Committee, Report on Advance Health Care Directives: Mental Health

---

[5] Available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=63ac0471-5975-49b0-8a36-6a4d790a4edf#:~:text=The%20Uniform%20Health%20Care%20Decisions,health%2Dcare%20powers%20of%20attorney> (as of March 15, 2023). The 1993 Uniform Act was a revision of the Model Health-Care Consent Act, as modified by the Uniform Rights of Terminally Ill Act. (See 1999-2000 Annual Report, 29 Cal. Law Revision Com. Rep. (1999) App. 6, pp. 678-681.)

Treatment, 2021 California Assembly Bill No. 2288, California 2021-2022 Regular Session (March 17, 2022)[6] ["This bill clarifies that advance health care directives include mental health and treatment, modifies the statutory advance health care directive form accordingly, and makes more prominent the requirement that the advance health care directive be either notarized or witnessed by two qualified individuals."].)

Consistent with these purposes, the Legislative Findings for the Health Care Decision Law state that the law was passed "[i]n recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn" and further notes that "In the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person." (Prob. Code, § 4650, subds. (a)-(b).)

There is nothing in the history of these laws that mentions arbitration or legal proceedings, beyond noting that "a court is normally not the proper forum in which to make health care decisions." (Prob. Code, § 4650, subd. (c).) The statute was not written for purposes of deciding what forum legal claims should be decided. Rather, consistent with the statutory language and language of the Advance Health Care Directive form, the law was passed to empower people to have their end-of-life choices regarding

---

[6] Available at <https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/ab_2288_choi_sjud_analysis.pdf> (as of March 15, 2023).

medical treatment honored, most significantly, the choice to refuse medical treatment.

This history only supports the conclusion that "health care decisions" are decisions about receiving or refusing medical care that derive from the right to individual autonomy animating the law, not about whether to arbitrate legal claims.

C. Appellants Cannot Explain How the Advance Health Care Directive Empowered Mr. Harrod to Execute an Unnecessary Arbitration Agreement

Appellants contend that Civil Code section 2319—which allows an agent to do "everything necessary or proper and usual … for effecting the purpose of his agency"—empowered Mr. Harrod to bind Mr. Logan to arbitrate any future claims against Country Oaks. (App. Br. 14-18.) They also argue that the Health Care Decisions Law justifies this authority. (App. Br. 18-21.) Both arguments fail. Signing an arbitration clause is neither necessary nor proper and usual for admission to a skilled nursing facility, and nothing in the Probate Code suggests otherwise.

As the Court of Appeal correctly explained, deciding whether to waive a principal's right to a jury trial cannot be a "necessary or proper and usual" part of admitting someone to a nursing home because that decision—by law and in practice—has no bearing on nursing home admissions. (*Logan*, *supra*, 82 Cal.App.5th at p. 372.) That is because Health and Safety Code section 1599.81, subdivision (a) and Title 42 Code of Federal Regulations section 483.70, subdivision (n)(1) both prohibit a skilled nursing facility from conditioning admission upon a resident's agreement to arbitrate. Moreover, nursing homes are required to use a universal admission agreement that cannot include an arbitration clause. (Cal. Code Regs., tit. 22, § 73518, subd. (d).) Under these circumstances, agreeing to arbitrate future disputes is not a necessary or proper and usual

part of effecting the purpose of the agency, which is to make surrogate health care choices.

And as explained above, the Health Care Decisions Law expressly limits the authority of a health care agent to decisions concerning "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental health condition." (*Logan*, *supra*, 82 Cal.App.5th at p. 372.) The authorities Appellants cite do not undermine this conclusion. As the Court of Appeal held, *Madden* did not address this issue, and the reasoning in *Garrison* does not support the conclusion it reached. (*Id.* at p. 371, 72.)

1. Deciding Whether To Arbitrate is Not A "Necessary or Proper and Usual" Part of Selecting a Skilled Nursing Facility

Civil Code section 2319 grants an agent authority to do "everything necessary or proper and usual … for effecting the purpose of his agency." Relying on this section, *Madden* held that the body tasked with negotiating medical insurance for state employees, which derived its authority from Government Code sections 22774, 22790 and 22793, could bind members to an insurance plan that included mandatory arbitration of medical malpractice claims. (*Madden*, *supra*, 17 Cal.3d 699, 709 [holding 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."].) Appellants seize on this language from *Madden*, arguing that because agreeing to the arbitration of malpractice claims was necessary or proper and usual in the context of selecting a group insurance plan in *Madden*, the same must be true in the context of admission to a nursing facility. (App. Br. 14.) This syllogism fails for at least three reasons.

First, agency law—which includes section 2319—applies only if the Health Care Decisions Law "does not provide a rule governing agents under powers of attorney." (Prob. Code, § 4688.) In *Madden*, the Court addressed a section of the Government Code defining the power of plan agents and needed to look to general principles of agency law to fill the gaps. (*Madden*, *supra*, 17 Cal.3d at p. 706.) But here, there are no gaps. The plain language of the Advance Health Care Directive and the Health Care Decisions Law provide a clear rule that governed Mr. Harrod's agency under the Advance Health Care Directive: He was empowered to make "health care decisions," which are expressly defined by both dictionaries and the Health Care Decisions Law in manner that excludes optional legal decisions that have no bearing on health care.

Second, admitting an individual to a nursing facility is governed by different laws than collectively bargaining for medical insurance. Those laws decouple the decision to obtain nursing care from the decision to arbitrate legal claims. Health and Safety Code section 1599.81, which is entitled "Admission Contracts for Long-Term Health Care Facilities," provides in subpart (a) that:

> All contracts of admission that contain an arbitration clause shall clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility.

Similarly, federal law, as set forth in Title 42 Code of Federal Regulations section 483.70, subdivision (n), which is entitled "Binding Arbitration Agreements," provides in subpart (1) that:

> The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or

> her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.

Finally, pursuant to these laws, California's law on the "Standard Admission Agreement" further requires:

> The licensee shall not present any arbitration agreement to a prospective resident as a part of the Standard Admission Agreement. Any arbitration agreement shall be separate from the Standard Admission Agreement and shall contain the following advisory in a prominent place at the top of the proposed arbitration agreement, in bold-face font of not less than 12 point type: "**Residents shall not be required to sign this arbitration agreement as a condition of admission to this facility**."

(Cal. Code Regs., tit. 22, § 73518, subd. (d) [emphasis in original].)

As the Court of Appeal correctly held, because the law "decouple[s]" arbitration agreements from facility admissions, there is no sense in which whether to arbitrate was a "necessary or proper and usual" decision Mr. Harrod needed to make to "effect[] the purpose of his agency," which was, in this instance, to admit Mr. Logan to Country Oaks. (*Logan*, *supra*, 82 Cal.App.5th at p. 373 [quoting Civ. Code, § 2319, subd. (1)].) *Madden* did not address nursing home admissions and did not purport to define what is necessary or proper and usual in the circumstances at issue in this case.

Appellants evade this issue. They do not cite any of these laws in their Opening Brief beyond vaguely alluding to them in reference to the arbitration clause and admission agreement being "separate documents." (App. Br. 18.) Nor do they fairly respond to the Court of Appeal's reasoning. "Nothing in *Madden*," they say, turned on "the number of documents the agent executed," or whether "the health plan and the arbitration agreement were contained in separate documents." (App. Br.

18.) But that mischaracterizes the Court of Appeal's point. The relevant question, according to the court, was not how many documents Mr. Harrod had to sign to execute the arbitration agreement; the question was whether executing an arbitration agreement was necessary or proper and usual to effectuate the purpose of his agency—i.e., deciding whether to admit Mr. Logan to Country Oaks. (*Logan*, *supra*, 82 Cal.App.5th at p. 373 [quoting Civ. Code, § 2319, subd. (1)].)

Third, the context of *Madden* separately renders it inapplicable. (*Logan*, *supra*, 82 Cal.App.5th at pp. 372-73.) The agent in *Madden*—the Board of Administration of the State Employees Retirement System (the Board)—was statutorily authorized to "make group medical plans available to state employees" by "enter[ing] into renewable one-year contracts with carriers offering basic health plans." (*Madden*, *supra*, 17 Cal.3d at p. 703.) The Board was thus tasked with finding an insurance plan that best suited the varied interests of its many constituents, including keeping premiums low, which agreeing to arbitrate medical malpractice claims helps do. There is no countervailing benefit in the context of an individual admission to a skilled nursing facility. The cost is the same no matter what.

Also, in the context of collectively bargaining for medical insurance, including arbitration was "customary" (*Madden*, *supra*, 17 Cal.3d at p. 708.) Indeed, there is no reason to believe that the Board could have found a plan that did not include arbitration if it wanted to.[7] In the context of skilled nursing facilities, however, no facility can require arbitration at all. Since Country Oaks was legally prohibited from conditioning its

---

[7] *See* https://www.citizen.org/article/arbitration-clauses-in-insurance-contractsthe-urgent-need-for-reform/ (noting that "it may be impossible to find a competing insurer who doesn't require them").

acceptance of the terms of the contract on the inclusion of an arbitration clause, *Madden's* reasoning provides no guidance here. [8]

Appellants remaining arguments are no better. They assert that "arbitration [is] a favored method of resolving disputes." (App. Br. 14 [quoting *Madden*, *supra*, 17 Cal.3d at pp. 707-09].) But as the Court of Appeal observed, "[t]here is no public policy favoring arbitration of disputes" where, as here, "the parties have not agreed to arbitrate." (*Logan*, *supra*, 82 Cal.App.5th, at p. 370 [quoting *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701]; accord *Garrison, supra*, 132 Cal.App.4th at pp. 263-64 (explaining there is "no preference" for arbitration "when the parties have not agreed to arbitrate"). There is certainly no policy in favor of waiving the legal rights of unsuspecting and vulnerable individuals who are only seeking to plan their end-of-life health care decisions; to the contrary, the law narrowly construes such delegations of personal autonomy. (*Farmers Group*, *supra*, 104 Cal.App.4th at p. 1214.)

Appellants also suggest that *Doyle v. Giuliucci* (1965) 62 Cal.2d 606 (see App. Br. 14) and several other cases involving arbitration agreements (see App. Br. 16, fn. 4) support the conclusion that Mr. Harrod's authority under the Advance Health Care Directive extended to optional arbitration agreements. But none of those cases provides that support. *Doyle* held that

---

[8] The admission timeline in this case only emphasizes this point. Mr. Logan was admitted to Country Oaks on November 10, 2019. (AA 82, 126.) He fell, unsupervised, on November 13. (AA 19.) Two weeks later—on November 29—County Oaks asked Mr. Harrod to sign an arbitration agreement that covered its liability for the fall. (AA 62.) Appellants obscure this timeline in its description of the facts of this case (App. Br. 8-12) and fail to explain how Mr. Harrod's decision to sign an optional arbitration agreement on November 29 was a "necessary or proper and usual" part of the decision to admit Mr. Logan to Country Oaks weeks before.

a parent's authority to bind his or her children to an arbitration agreement is "implicit in a parent's right and duty" under the law "to provide for the care of his child." (*Doyle*, *supra*, 62 Cal.2d at p. 610 [citing Civ. Code, § 196; *Slaughter v. Zimman* (1951) 105 Cal.App.2d 623, 625; Pen. Code, § 270].) These rights and duties are broad, general, and well established in the law. There is, by contrast, no implicit power for nephews to waive the legal rights of their uncles. The sources of Mr. Harrod's authority were Mr. Logan's Health Care Directive and the Health Care Decisions Law, both of which, as described above, plainly limit Mr. Harrod's authority to "health care decisions," which the Probate Code expressly defines. For this reason, *Doyle* is not remotely comparable. The other cases Appellants string cite (see App. Br. 16, fn. 4) are irrelevant for similar reasons.[9]

---

[9] *See Engalla v. Permanente Med. Grp., Inc*. (1997) 15 Cal.4th 951, 977-978 [merely recognizing *Madden*'s holding in the context of group medical benefits, which has no bearing here]; *Wilson v. Kaiser Found. Hosps.* (1983) 141 Cal.App.3d 891, 898-99 [holding, following *Doyle*, *supra*, 62 Cal.2d 606, mother's authority to bind unborn child to arbitrate was, unlike here, "implicit in a parent's right and duty to provide for the care of his child"]; *NORCAL Mut. Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 82 [wife "was required to abide by [husband's malpractice] policy's requirement of arbitration of disputes" because, unlike here, wife "accepted the benefit of the insurance policy in handling the underlying malpractice suit"]; *Michaelis v. Schori* (1993) 20 Cal.App.4th 133, 139 [father of stillborn child was bound by child's mother's arbitration agreement because, unlike here, claim arose out of *her* treatment, which she had agreed to arbitrate]; *Harris v. Superior Ct.* (1986) 188 Cal.App.3d 475, 479 [physician bound by arbitration agreement because, unlike here, he was employee of organization subject to arbitration agreement, was acting on organizations behalf, and accepted benefits from the agreement]; *Hawkins v. Superior Ct.* (1979) 89 Cal.App.3d 413, 415-19 [wife bound by arbitration agreement husband executed as part of their joint health insurance contract because, unlike here, "[s]pouses have mutual obligations to care for and support the other … including the obligation to provide medical care" and "occupy a fiduciary relationship to each other"].

2. *Garrison* Misapplies the Health Care Decisions Law

Appellants' final argument is that *Garrison* applied the Health Care Decisions Law to reach a result that is inconsistent with the Court of Appeal's holding below. (App. Br. 18-21 [summarizing *Garrison*].)[10] Because Appellants do not (and cannot) explain why the Court of Appeal's treatment of the Health Care Decisions Law below was incorrect, they simply quote *Garrison* at length and opine, with almost no explanation, that it is "better reasoned." (App. Br. 14, 18-21.)

Appellants are incorrect. As an initial, critical matter, *Garrison* did not analyze or even cite the laws prohibiting nursing homes from conditioning admission on an agreement to arbitrate.[11] And as explained above, it also misapplied the Probate Code. The relevant sections of the Health Care Decisions Law—Probate Code sections 4683, 4617, and 4615—do not empower an agent for "health care decisions" to sign wholly optional arbitration agreements. *Garrison* "says nothing" about why section 4683, which authorizes an agent to make the same "health care decisions" as his or her principal, extends to unnecessary legal decisions. (See *Logan*, supra, 82 Cal.App.5th, 365, 372.) In fact, unlike the decision below, which treats the issue at length, *Garrison* does not even mention Probate Code

---

[10] As one Court of Appeal observed in holding that the power to make a "health care decision" does not include the ability to agree to arbitrate legal claims, *Garrison*'s statements about the meaning of the term was unnecessary to result in that case. (See *Young v. Horizon West, Inc*. (2013) 220 Cal.App.4th 1122, 1129 ["The reviewing court did, however, express the view that the term 'health care decisions' made by an agent encompasses the execution of arbitration agreements on behalf of the patient. So broad an interpretation of 'health care decisions' seems unnecessary to the result in *Garrison*, and to the extent that the court intended such a general application, we disagree with its conclusion."].)

[11] Title 42 Code of Federal Regulations section 483.70, which mirrors California law, was enacted after *Garrison* was decided.

sections 4617 and 4615, which *define* the terms "heath care" and "health care decision" and thereby provide the primary authoritative guidance on the scope of a health-care agent's authority. Because these provisions plainly limit that authority to what are essentially medical decisions, Appellants ignore them too.

The only other sections of the Probate Code *Garrison* analyzes are 4684 and 4688. (*Garrison*, *supra*, 132 Cal.App.4th 253, 266.) But those provisions are no help to *Garrison*'s holding, either. Section 4684 provides that "[a]n agent shall make a health care decision in accordance with the principal's individual health care instructions," if known, or, if unknown, "in accordance with the agent's determination of the principal's best interest," which should be informed by "principal's personal values." This provision, however, still restricts the agent's authority to "health care decision[s]," which, for the reasons already given, do not extend to optional legal agreements that have no bearing on the principal's health care. (*See Logan*, *supra*, 82 Cal.App.5th at p. 372 ["Where, as here, neither the plain language of the Advance Directive nor any evidence in the record demonstrates Logan's wishes or personal values regarding arbitration, we fail to see how section 4684 sheds light on whether the agent's execution of an arbitration agreement is a 'health care decision.'"].)

Probate Code section 4688 provides that, "[w]here this division does not provide a rule governing agents under powers of attorney, the law of agency applies." This section is irrelevant for the reasons already given: The Health Care Decisions Law *does* provide a clear rule that governed Mr. Harrod's agency under the Directive. But even if it had not, the relevant law of agency—Civil Code section 2319—provides that an agent's authority is limited to those actions that are "necessary or proper and usual … for effecting the purpose of his agency." And for the reasons discussed in the previous section, signing an optional, freestanding arbitration agreement

was not "necessary or proper and usual" step Mr. Harrod took to admit Mr. Logan to Country Oaks.

In addition to citing these provisions of the Probate Code, which do not support the scope of authority Appellants seek, *Garrison* suggests that the decision whether to arbitrate, while not a "health care decision" itself, becomes one if the agent makes it "while making health care decisions," or during "the health care decisionmaking process." (App. Br. 19 [quoting *Garrison*, *supra*, 132 Cal.App.4th at p. 266].) Appellants make a similar point when they suggest that "the person in charge of making health care decisions for another has the authority to deal with all the paperwork that admission to a health care facility entails." (App. Br. 20.) This argument fails both factually and legally: factually, because arbitration is not a factor people consider when choosing a nursing facility; and legally, because doing two things simultaneously (e.g., walking and chewing gum) does not somehow make them similar activities.

Regarding *Garrison*'s factual mistake, as the Court of Appeals recounts, the regulatory history of Title 42 Code of Federal Regulations section 483.70, subdivision (n)(1), shows that people choose nursing homes based on factors such as "geographic distance" and "the type of payment the facility will accept, the health care and services it offers, and the availability of beds." (*Logan*, *supra*, 82 Cal.App.5th at p. 374 [quoting 84 F.R, 34727-34728 (2019)].) This "demonstrate[s] that, practically speaking, arbitration agreements are not executed as part of the health care decisionmaking process, but rather are entered into only *after* the agent chooses a nursing facility based on the limited options available and other factors unrelated to arbitration." (*Id*. at pp. 375.)

But even setting that aside, neither *Garrison* nor Appellants offer any authority to support Garrison's conclusion that signing an arbitration agreement "while making health care decisions" transforms it into a

healthcare decision.[12] Nor can they. The scope of an agent's authority is fixed by the terms of the Advance Health Care Directive the principal executes; it does not expand and contract based on whatever else the agent happens to be doing while exercising his agency. Were *Garrison* and Appellants correct, then Mr. Harrod would have had authority, on Mr. Logan's behalf, to loan money to Country Oaks, lease it a new van, buy stock from its parent company, donate to a "new cafeteria" fund, or make any other financial or legal commitments Country Oaks asked him to make so long as Country Oaks presented them as part of "the paperwork" it provided with its admissions forms. Those decisions would have the same bearing on Mr. Logan's admission to the facility as the arbitration agreement did: None.[13] (See Health & Saf. Code, § 1599.81, subd. (a); 42 C.F.R., § 483.70, subd. (n)(1).)

The only other arguments Appellants make are far afield. They say that the Court of Appeal's decision below "ignores this Court's conclusions in *Madden*." (App. Br. 21.) But the Court of Appeal devoted multiple pages precisely to explaining why *Madden*'s conclusions do not apply here. (See *Logan*, *supra*, 82 Cal.App.5th at pp. 372-73.) They also argue that, "[i]f 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

---

[12] Indeed, it is not even clear that Appellants offer this argument as one of their own. The point simply appears, without comment, as part of a page-long block quote from *Garrison*. (See App. Br. 19.)

[13] *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, which Appellants cite but do not discuss (see App. Br. 16), makes the same mistake. Relying on *Garrison*, *Hogan* concludes that "execution of [an] arbitration agreement" is "part of the health care decisionmaking process" simply because the agent "may well be asked" to sign such an agreement by the admitting facility. (*Id.* at p. 267-68.) For the reasons above, this syllogism fails.

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." (App. Br. 21; *see also id.* at p. 7 (arguing that a person "empower[ed] … to make life and death decisions" is thereby empowered to make "the far less significant decision to arbitrate a dispute"). Setting aside Appellants' characterization of the constitutional right to a jury trial as "pedestrian," it is, in any case, plainly wrong that authorizing an agent to perform an act thereby authorizes him to perform *any other* act a court deems more "pedestrian." This would spell the end of all limited powers of attorney. Appellants offer no authority for it because, as they know, there is none.

D. Cases from Other Jurisdictions Also Hold that Agreeing to Arbitration Is Not a Health Care Decision

Several states to consider this issue have found that the scope of a health-care agent's authority does not include the power to bind the principal to arbitration.

In a recent case that is materially identical to this one, the Supreme Court of Wyoming, after conducting a thorough statutory analysis, held that "the decision to enter into an arbitration agreement is not a 'health care decision'" under state statutory definitions that mirror those here. (*Miller v. Life Care Centers of Am., Inc*. (Wyo. 2020) 478 P.3d 164, 172 ["[T]he Arbitration Agreement was not required for admission to the facility; it plainly stated it was 'voluntary' and 'optional.' The lack of relationship between [principal's] admission to [facility] and the Arbitration Agreement is further evidenced by the fact [principal] was admitted to [facility] on June 16, 2015, but [agent] did not sign the Arbitration Agreement until June 18, 2015."]; accord *Arredondo v. SNH SE Ashley River Tenant, LLC* (2021) 433 S.C. 69, 84, cert. denied (Dec. 6, 2021) [holding health care power of attorney lacked authority to sign arbitration agreement where it was "not

required … for [principal] to be admitted]"); *Johnson v. Kindred Healthcare, Inc*. (2014) 466 Mass. 779, 781 [concluding agent's "agreement to arbitrate … does not bind the principal" because it is "not a health care decision" under state statute].)

The Supreme Court of Mississippi similarly held that, while a daughter's statutory power of attorney to make her father's "health-care decision[s]" included the power to "select[] and discharge … health-care providers and institutions," her agency did not include the power to sign an arbitration agreement because, like Mr. Harrod in this case, she "was not required to sign [it] to admit [her father] to the [nursing home]." *Mississippi Care Ctr. of Greenville, LLC v. Hinyub* (Miss. 2008) 975 So.2d 211, 218 ["Since signing the arbitration provision was not a part of the consideration necessary for [father's] admission to MCCG and not necessarily in the best interest of [father] as required by the Act, [daughter] did not have the authority as [father's] health care surrogate to enter into the arbitration provision contained within the admissions agreement."].)

The Supreme Court of Nebraska, too, found that, while a nursing home resident's surrogate was "authorized … to sign the required admission papers" at her nursing home, "his actual authority did not extend to signing an arbitration agreement that would waive [her] right of access to the courts and to trial by jury" because, as in California, "[t]he agreement was optional and was not required for [her] to remain at the facility." (*Koricic v. Beverly Enterprises—Nebraska, Inc*. (2009) 278 Neb. 713, 719.)[14]

---

[14] Appellants' will likely argue that *Hinyub* and *Koricic* are distinguishable because the agent in *Hinyub* had statutory authority and the agent in *Koricic* had implied authority based on the principal's history of using the agent as a health-care surrogate. But these differences are irrelevant. In both cases, the court determined that the agent had authority to make health-care

Intermediate appellate courts from several other states have reached similar conclusions. (*See, e.g.*, *Coleman v. United Health Servs. of Ga., Inc*., (2018) 344 Ga.App. 682, 812 [explaining execution of "voluntary" arbitration agreement "cannot be viewed as a health care decision"]; *Primmer v. Healthcare Indus. Corp*. (Ohio Ct. App. 2015) 43 N.E.3d 788, 793 [holding power of attorney for health care lacked authority to sign arbitration agreement because it was "not a condition of admission" and so not within scope of agent's power to make "health care decisions"]; *Wisler v. Manor Care of Lancaster PA, LLC* (Pa. Super. Ct. 2015) 124 A.3d 317, 324 ["[T]he authority to consent to medical treatment and care on behalf of a principal does not necessarily entail the authority to consent to arbitration, agreement to which was not a precondition to be admitted to [facility]."]; *Dickerson*, *supra*, 414 Md. 419, 447 ["The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement."]; *Lujan v. Life Care Centers of Am.* (Colo. App. 2009) 222 P.3d 970, 973 ("[W]e fail to perceive how an agreement to arbitrate is a decision concerning 'the provision, withholding, or withdrawal of any health care, medical procedure, ... or service to maintain, diagnose, treat, or provide for a patient's physical or mental health or personal care.'"]; *Texas Cityview Care Ctr., L.P. v. Fryer* (Tex. App. 2007) 227 S.W.3d 345, 352 ["[N]othing in the medical power of attorney," which allows agent to make "any health care decision on principal's behalf," "indicates that it was intended to confer authority on [agent] to make legal … decisions for [principal], such as whether to waive [principal's] right to a jury trial by agreeing to arbitration of any

---

decisions, such as the decision to admit the principal to the nursing home. And in both cases, the Court concluded that such authority does not extend to optional arbitration agreements. The same is true here.

disputes."]; *Blankfeld v. Richmond Health Care, Inc.* (Fla. Dist. Ct. App. 2005) 902 So.2d 296, 300-01 [holding that "health care proxy," "whose purpose is simply to consent to health care services that the patient herself would likely choose if able to do so," cannot "enter into contracts which agree to things not strictly related to health care decisions," including, among other things, "waiv[ing] the right to trial by jury"].)

***

In sum, Mr. Harrod lacked authority to sign the arbitration agreement. The plain language of Mr. Logan's Advance Health Care Directive and the Health Care Decisions Law both expressly restricted Mr. Harrod's authority to "health care decisions," just as the Court of Appeals held. Probate Code sections 4617 and 4615 define that term to include decisions about treatments, services, procedures, and other types of medical care that have nothing to do with the optional legal decision Mr. Harrod made here. And because California and Federal law prohibited Country Oaks from requiring Mr. Harrod to sign an arbitration agreement as the price of Mr. Logan's admission, there is no sense in which Mr. Harrod's decision to sign it was a "necessary or proper and usual" step on the path to admitting Mr. Logan to the facility. Other states, moreover, have reached the same conclusion in analogous circumstances.

II. *KINDRED* DOES NOT TRANSFORM ARBITRATION INTO A "HEALTH CARE DECISION"

After failing to present this issue in the Court of Appeal or trial court, Appellants argue that, following *Kindred*, *supra*, 581 U.S. 246, an interpretation of Mr. Logan's Advance Health Care Directive that fails to treat an arbitration agreement as a "health-care decision" violates the FAA (Federal Arbitration Act)—and therefore the Constitution's Supremacy Clause—by singling out arbitration agreements for disfavored treatment. (App. Br. 22-29.)

Appellants are mistaken. Deciding what constitutes a "health care decision" under the California Probate Code and Advance Health Care Directive is a paradigmatic question of state law over which this Court has plenary authority, which is resolved through conventional principles of contract and statutory interpretation. (See, e.g., *In re Broad's Est.* (1942) 20 Cal.2d 612, 616-18 [interpreting Probate Code section 41 in accordance with the common law underpinnings and legislative intent].) The Court of Appeal employed those interpretive principles in determining that whether to arbitrate is, like countless other potential decisions, not a "health care decision" under the Advance Health Care Directive. Far from crossing the line *Kindred* drew, the Court of Appeal's analysis does not even approach it.

In *Kindred*, the Kentucky Supreme Court held that the grant of even a "seemingly comprehensive" power of attorney "does not permit a legal representative to enter into an arbitration agreement for [the principal]" unless that principal grants the representative express authority to "waive [the] principal's fundamental constitutional rights to access the courts [and] to trial by jury." (*Kindred*, *supra*, 581 U.S. 246, 248.) The United States Supreme Court reversed. To ensure that arbitration agreements are "put … on an equal plane with other contracts," the Court explained, the FAA preempts any state rule that either "discriminat[es] on its face against arbitration" or "covertly accomplishes the same objective by disfavoring contracts that … have the defining features of arbitration agreements." (*Id.* at pp. 251-252.) Kentucky's judge-made rule violated the FAA because it "single[d] out arbitration agreements for disfavored treatment." (*Ibid.*)

This case does not involve any judge-made rule targeting arbitration; it simply requires interpreting state law using the commonplace, neutral principles of construction set forth in Section I above. In *Kindred*, the Kentucky Supreme Court plainly targeted arbitration's defining

characteristics: It "required an explicit statement before an attorney-in-fact, even if possessing broad delegated powers, could relinquish [the right to a jury trial] on another's behalf." (*Kindred*, *supra*, 581 U.S. at p. 252.) Here, by contrast, the Court of Appeal construed what constitutes a "health care decision" under the California Probate Code and held merely that whether to arbitrate—like any other decision that does not concern healthcare—could not be made by the agent appointed to make health care decisions. This is perfectly consistent with *Kindred*, which did "not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case," but simply required that the rule "in fact apply generally, rather than single out arbitration." (*Id.* at p. 254, fn. 2.) The Court of Appeal's interpretation of "health care decisions," which applies as much to innumerable other contacts as it does to arbitration agreements, does just that.[15]

Rather that explain how a by-the-book interpretation of "health care decision" "singl[es] out" arbitration agreements for disfavored treatment, Appellants cite a bolus of out-of-state authorities that they allege apply *Kindred* in identical contexts to compel nursing home residents to arbitrate claims. (App. Br. 24-27.) None of the cases Appellants cite is even close to analogous to this one.[16]

---

[15] It is true, of course, that an arbitration agreement's status a legal agreement explains *why* whether to sign one is not a health care decision. But that does not mean that the Court of Appeal's interpretation of "health care decision" "singl[es] out [arbitration agreements] for disfavored treatment," as *Kindred*, *supra*, 581 U.S. 246, 252, prohibits, any more than inviting only your neighbors to a potluck "singles out" residents of Switzerland for disfavored treatment, even though their residency there explains why they were not invited.

[16] Significantly, Appellants ignore all but one of the cases from other jurisdictions that, as discussed in Section I, D., genuinely do bear on the

In Appellants' lead case—*Drummond v. Bonaventure of Lacey, LLC* (2021) 20 Wn.App.2d 455—the estate of a deceased assisted-living-facility resident argued that the arbitration agreement the resident's daughter signed was invalid because, read together, two Washington state laws (RCW 70.129.105 and RCW 70.129.005) prohibited the facility from "requesting that a resident waive … the right to a jury trial" in the first place. (*Id.* at p. 457.)[17] The court disagreed. The "plain language" of the relevant statute, it held, "merely stated [the legislature's] intent that residents 'continue to enjoy their basic civil and legal rights,'" and so "d[id] not set forth a jury trial right" the facility could not ask the resident to waive. (*Id.* at p. 462.) In dicta, the court also noted that interpreting the relevant statutes specifically to prohibit arbitration agreements would violate *Kindred*, but that is because doing so, in this context, would target "a defining feature of arbitration agreements"—namely, waiver of "the right to a jury trial." (*Id.* at p. 463.) As explained above, the run-of-the-mill analysis the Court of Appeals applied below—and the analysis the Court should employ here—

---

primary issue in this case. The one case they do discuss—*Arredondo*, *supra*, 433 S.C. 69—does not just support Mr. Logan's argument, but also cites a plethora of cases from various states (not all of which are included in this brief) that do as well. (*Id.* at p. 82-83.) Appellants try to distinguish *Arredondo* on the grounds that the Health Care Power of Attorney there "did not specifically empower [the] agent to make health care decisions." (App. Br. 28.) But that is a distinction without a difference, as the power of attorney authorized the agent to "take any … action necessary to making, documenting, and assuring implementation of decisions concerning my health care." (*Arredondo*, *supra*, 433 S.C. at pp. 80-81.) *Arredondo* is therefore right on point.

[17] Assisted living facilities are governed by different standards than skilled nursing facilities and are not, for example, subject to Health and Safety Code section 1599.81, Title 42 Code of Federal Regulations section 483.70, subdivision (n)(1), or Title 22 California Code of Regulations section 73518, subdivision (d).

does not target arbitration or the right to a jury trial. It simply gives "health care decisions" its plain statutory meaning.[18]

The next case Appellants cite (App. Br. 25)—*LP Louisville East, LLC v. Patton* (Ky. 2020) 651 S.W.3d 759, *as modified on denial of reh'g* (Apr. 29, 2021)—supports Mr. Logan, not Appellants. There, the Supreme Court of Kentucky explained that it *already adopted* the position Mr. Logan argues for here. (*See LP Louisville*, *supra*, 651 S.W.3d 759, 769 ["In *Ping v. Beverly Enterprises, Inc*. (Ky. 2012) 376 S.W.3d 581, 593], this Court decided similarly to other courts, that when a power of attorney document authorizes the agent to make medical care decisions along with related required acts and 'the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, … [the] authority to choose arbitration is not within the purview of a health-care agency, since in that circumstance agreeing to arbitrate is not a 'health care' decision.'"].)[19]

The other cases Appellants cite (App. Br. 25-27) are irrelevant, as they concern state statutes or court-made rules that, unlike the Court of Appeal's holding here, facially or all-but-facially target arbitration

---

[18] *Evangelical Lutheran Good Samaritan Society v. Moreno*—a case Appellants cite but do not discuss—misses the target for the same reason. There, the court found that "requir[ing]" an agent to "inquir[e] into" the principal's position on arbitration before signing an arbitration agreement "single[s] out [an] arbitration agreement[ ] for disfavored treatment" in just the manner *Kindred* prohibits. (*Evangelical Lutheran* (D.N.M. 2017) 277 F.Supp.3d 1191, 1231.) Under *Kindred*, a court cannot "create a legal rule that 'appl[ies] only to arbitration.'" (*Id.* at p. 1232 [quoting *Kindred*, *supra*, 137 S.Ct. at 1427].) Here, by contrast, Mr. Logan is not asking the Court to create such a rule.

[19] Appellants also cite *Ingram v. Brook Chateau* (Mo. 2019) 586 S.W.3d 772. But while that case cites *Kindred*, it provides no analysis, and does not even suggest that it has the FAA in mind when it does. (*See id.* at p. 776.)

agreements and so plainly run afoul of the FAA. (*See Carter v. SSC Odin Operating Co*., LLC (2010) 237 Ill.2d 30, 35 [concerning Illinois laws that declared "null and void" any "waiver of the right to a trial by a jury, whether oral or in writing, prior to commencement of an action"]; *Valley View Health Care, Inc. v. Chapman* (E.D. Cal. 2014) 992 F.Supp.2d 1016, 1027 [concerning California statute that declared "void as contrary to public policy" any "agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue" under certain sections of the law]; *Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc*. (2010) 415 N.J.Super. 272, 277, 293 [concerning New Jersey statutes that declared "void and unenforceable" any "provision or clause waiving or limiting the right to sue ... between a patient and a nursing home"]; *Triad Health Management of Georgia, III, LLC v. Johnson* (2009) 298 Ga.App. 204, 208 [concerning Georgia statute declaring that "no agreement to arbitrate shall be enforceable unless the agreement was made subsequent to the alleged malpractice and after a dispute or controversy has occurred and unless the claimant is represented by an attorney at law at the time the agreement is entered into"]; *Strausberg v. Laurel Healthcare Providers, LLC* (N.M. 2013) 304 P.3d 409, 412 [concerning New Mexico Court of Appeals decision that expressly "treats nursing home arbitration agreements differently than other contracts" by reversing the burden of proof for affirmative defense when, but only when, defense concerns arbitration]; *THI of New Mexico at Hobbs Center, LLC v. Patton* (10th Cir. 2014) 741 F.3d 1162, 1169 [concerning New Mexico District Court decision relying on supposition that "having to arbitrate a claim is disadvantageous"]; *Maide, LLC v. DiLeo for DiLeo* (2022) 138 Nev. Adv. Op. 9 [504 P.3d 1126, 1128] [concerning Nevada statute deeming arbitration provisions, but not other contracts, "void" unless they include "a specific authorization" to arbitrate].

The only thing Appellants' cases demonstrate is that the Court of Appeal's decision here is nothing like them. Appellants do not seek to put arbitration agreements "on an equal plane with other contracts," as *Kindred* requires. (*Kindred*, *supra*, 581 U.S. 246, 252.) They seek to put arbitration agreements on a pedestal—to a create a rule of construction that would subject unsuspecting people seeking health care to legal terms they never contemplated, much less assented to, and usurp the State's suzerainty over the interpretation of its own Probate Code. Nothing in *Kindred* or any other case entails such a result.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed and all inconsistent decisions, including *Garrison*, should be overruled.

Dated: March 16, 2023

Respectfully submitted,

/s/ Matthew Borden

BRAUNHAGEY & BORDEN LLP
Matthew Borden (SBN: 214323)
Kory J. DeClark (SBN: 310571)
351 California Street, 10th Floor
San Francisco, CA 94104
Telephone: (415) 599-0210
Facsimile: (415) 276-1808
borden@braunhagey.com
declark@braunhagey.com

LANZONE MORGAN, LLP
Ayman R. Mourad (SBN: 304161)
Suzanne M. Voas (SBN: 339911)
5001 Airport Plaza Drive, Suite 210
Long Beach, CA 90815
Telephone: (562) 596-1700
Facsimile: (562) 596-0011
arm@lanzonemorgan.com
smv@lanzonemorgan.com

Attorneys for Plaintiff and Respondent

CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.504(d)(1)]

The text of this brief consists of 11,996 words as counted by the Microsoft Word word processing program used to generate this brief.

Dated this 16th day of March 2023, at San Francisco, California.

/s/ *Matthew Borden*
Matthew Borden

PROOF OF SERVICE

I, Omar Rivera Barrientos, declare:

I am over the age of 18 years and not a party to this action. My business address is BraunHagey & Borden LLP; 351 California Street, 10th Floor, San Francisco, CA 94104, which is located in the county where the service described below occurred.

I am readily familiar with the business practice of BraunHagey & Borden LLP for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence so collected is deposited with the United States Postal Service the same day. I certify that on March 16, 2023, I served a copy of the **Answer Brief on the Merits** by causing it to be placed in a sealed envelope, with postage thereon fully prepaid, and depositing the envelope with the United States Postal Service addressed to:

Buchalter, PC
Harry W.R. Chamberlain II
Robert M. Daro
1000 Wilshire Blvd., Suite 1500
Los Angeles, CA 90017
radato@buchalter.com
(Via TrueFiling)

Sun Mar Management Services
Julieta Y. Echeverria
Brittany A. Ortiz
3050 Saturn Street, Suite 101
Brea, CA 32821
jecheverria@sunmarhealthcare.com
(Via TrueFiling)

Traci L. Shafroth
Tucker Ellis LLP
(Attorneys for Amici CMA et al.)
(Via TrueFiling)

Court of Appeal
Second Appellate District
Division Four
(Via TrueFiling)

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

Dated: March 16, 2023

Omar Rivera Barrientos

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **LOGAN v. COUNTRY OAKS PARTNERS**
Case Number: **S276545**
Lower Court Case Number: **B312967**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **borden@braunhagey.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Answer Brief on the Merits

Service Recipients:

Person Served	Email Address	Type	Date / Time
Julieta Echeverria Sun Mar Management Services	jecheverria@sunmarhealthcare.com	e-Serve	3/16/2023 11:41:38 PM
Ayman Mourad Lanzone Morgan, LLP 304161	arm@lanzonemorgan.com	e-Serve	3/16/2023 11:41:38 PM
Robert Dato Buchalter, A Professional Corp. 110408	rdato@buchalter.com	e-Serve	3/16/2023 11:41:38 PM
Matthew Borden BraunHagey & Borden LLP 214323	borden@braunhagey.com	e-Serve	3/16/2023 11:41:38 PM
Cassidy Davenport Cole Pedroza LLP 259340	cassidydavenport@colepedroza.com	e-Serve	3/16/2023 11:41:38 PM
Kory DeClark BraunHagey & Borden LLP 310571	declark@braunhagey.com	e-Serve	3/16/2023 11:41:38 PM
Omar Rivera BraunHagey & Borden LLP	rivera@braunhagey.com	e-Serve	3/16/2023 11:41:38 PM
Kristi Cole Lanzone Morgan, LLP	kmc@lanzonemorgan.com	e-Serve	3/16/2023 11:41:38 PM
Suzanne Voas Lanzone Morgan LLP 339911	smv@lanzonemorgan.com	e-Serve	3/16/2023 11:41:38 PM
Traci Shafroth Tucker Ellis LLP (San Francisco) 251673	traci.shafroth@tuckerellis.com	e-Serve	3/16/2023 11:41:38 PM
Ayman Mourad	eservice@lanzonemorgan.com	e-	3/16/2023 11:41:38

Lanzone Morgan, LLP		Serve	PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

3/16/2023

Date

/s/Omar Rivera

Signature

Borden, Matthew (214323)

Last Name, First Name (PNum)

BraunHagey & Borden LLP

Law Firm