Case No.

S276545

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CHARLES LOGAN,

Plaintiff and Respondent,

v.

COUNTRY OAKS PARTNERS, LLC et al.,

Defendants and Appellants.

REPLY 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)

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INTRODUCTION

The advance health care directive and power of attorney executed by plaintiff and respondent Charles Logan authorized his nephew (Mark Harrod) to "[c]hoose or reject … health care facilities" on his behalf. Like virtually all health care facilities in this state (and elsewhere), defendants and appellants Country Oaks Partners, LLC, dba Country Oaks Care Center, and Sun Mar Management Services, Inc. (collectively Country Oaks) asked Harrod to sign an arbitration agreement in conjunction with Logan's admission, which he did. But Logan argues that "[a]rbitration is a legal decision, not a health care decision" (ans. brief [AB] at p. 2), and thus Harrod exceeded his authority.

Neither Logan nor the Court of Appeal meaningfully distinguish this court's decision in *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699. *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." (*Id.* at p. 709.) And applying *Madden* here avoids deciding whether singling out arbitration agreements for different treatment conflicts with the Federal Arbitration Act and recent United States Supreme Court cases such as *Kindred Nursing Centers Ltd. v. Clark* (2107) 581 U.S. 246. The judgment of the Court of Appeal should therefore be reversed.

ARGUMENT

I

Under *Madden,* the Directive's Provision to Choose Health Care Facilities Encompassed the Power to Consent to Arbitrate Disputes With Such Facilities.

In its opening brief, Country Oaks discussed this court's reasoning in *Madden* in holding that a power of attorney is broad enough to encompass the authority to agree to arbitration. Logan offers three reasons why *Madden* does not apply. None is persuasive.

Logan's first argument is that *Madden* applied general agency principles (Civ. Code, § 2319) only to "fill the gaps" in a statutory scheme and that "[t]he plain language of the Advance Health Care Directive and the Health Care Decisions Law provide a clear rule" that Harrod was not empowered to agree to arbitration. (AB at p. 22.) But the only "plain language" Logan cites is the power to make "health care decisions." This begs the central question: Does the power to make health care decisions encompass the authority to agree to arbitration? Neither the directive in this case nor the Health Care Decisions Law provides any guidance on this specific question. Just as in *Madden,* it is therefore appropriate to look to general agency principles. And *Madden* held that, under general agency principles established under state law (including the Probate Code), "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.)

Logan then argues that *Madden* does not apply because "admitting an individual to a nursing facility is governed by different laws than collectively bargaining for medical insurance." (AB at p. 22.) Logan's argument assumes that collective bargaining laws played an important role in the *Madden* court's decision. It played a minor role at best, with this court merely observing that "arbitration has become a customary means of resolving disputes" in labor negotiations. (*Madden, supra,* 17 Cal.3d at p. 708.)

The real reason Logan attempts to rely on laws concerning the admission to long term health care facilities is not to distinguish *Madden* (which it doesn't). Rather, he relies on those laws in an attempt to justify the Court of Appeal's erroneous conclusion that they "decouple the decision to obtain nursing care from the decision to arbitrate legal claims." (AB at p. 22, citing Health & Saf. Code, § 1599.81.)

However, the requirement in Health and Safety Code section 1599.81 that an arbitration provision must be contained in a form separate from the admission agreement does not magically "decouple" the power to admit a patient from the power to bind that patient to an arbitration provision. Instead, the question is whether a power of attorney authorizing an agent to make life and death decisions for a patient encompasses the power to arbitrate a dispute with the health care provider. And *Madden* answers that question: Yes.

Finally, Logan argues that *Madden* is inapplicable because a state board was statutorily authorized to find low-priced health insurance plans, and agreeing to arbitrate malpractice claims kept costs low. According to Logan, "[t]here is no countervailing benefit" in this case because the "cost is the same no matter what." (AB at p. 24.)

Again, the *Madden* opinion confirms that the "collective bargaining" context of the case provided only an additional reason to find the necessary authority. This court's opinion first recognized that arbitration "has become an accepted and favored method of resolving disputes [citations], praised by the courts as an expeditious and economical method of relieving overburdened civil calendars." (*Madden supra,* 17 Cal.3d at pp. 706-707.) *Madden* also rejected the antiquated notion that "the authority of an agent to agree to arbitration must be specially conferred." (*Id.* at p. 707.) It was only then that this court stated: "The matter *becomes even clearer* if we narrow our focus to arbitration of disputes arising under group contracts." (*Id.* at p. 708, italics added.) In other words, it was already clear without examining the context of group contracts that an agent has the authority to bind a principal to arbitration without specific language in the authorizing document. The "context" of *Madden* provides no basis to distinguish it from the present case.

II

The Health Care Decisions Law Provides No Basis to Conclude That an Agent Under a Power of Attorney Cannot Bind the Principal to Arbitration.

Being unable to meaningfully distinguish *Madden*, Logan argues that the "plain language" of the Health Care Decisions Law establishes that the power to make health care decisions does not include the power to agree to arbitration. (AB at p. 15.) Logan is again mistaken.

Probate Code section 4617 provides helpful definitions but Logan all but ignores the most important one. Under subdivision (a) of section 4617, a health care decision includes "[s]election and discharge of health care providers and institutions." Again, this only begs the question of whether the selection of a health care provider includes the power to agree to arbitrate claims against that provider. The Health Care Decisions law does not expressly address agreements to arbitrate, but does provide that an agent may implement decisions in the selection and oversight of health care services while the principal is incapacitated. The absence of specific guidance from the Health Care Decisions Law on this subject means that general agency principles apply, just as they did in *Madden*.

Logan next argues that the "structure" of the Probate Code supports the conclusion that an advance health care directive cannot authorize an agent to agree to arbitration. According to Logan, the Health Care Decisions Law "limits" the

power of attorney to "health care decisions," while the Power of Attorney Act (Prob. Code, § 4400 et seq.) "provides a 'broad and sweeping'" power of attorney that "authorizes an agent to make legal decisions." (AB at pp. 16-17.) But Logan's argument is built on a false premise. While the Health Care Decisions Law applies to health care decisions, there is no statutory "limitation" on the power to bind the principal to arbitration. As explained above, the Health Care Decisions Law is silent on this issue and general agency laws therefore apply.

Logan then argues that the legislative history of the Health Care Decisions Law establishes "that a delegation of authority under the Advance Health Care Directive is confined to end-of-law [*sic*; end of life] medical decisions, not arbitration of legal claims." (AB at p. 18.) Once again, Logan's own citations demonstrate no such narrow purpose. Rather, as Logan acknowledges, 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.,* quoting U. Law Com. (1993) Health-Care Decisions Act.) The question in this case is the "broader problem" of healthcare decisionmaking; it has nothing to do with "end of life" issues and the Health Care Decisions Law is not so limited. Logan's "legislative history" is not relevant to the issues before this court.

Logan next asserts that "[s]igning 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." (AB at p. 20.) However, as *Madden* aptly held, general principles of agency govern the agent's decision to arbitrate disputes under a "health services contract" entered into on the principal's behalf.

Likewise, the Courts of Appeal in *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 and *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259 applied *Madden*'s sound reasoning in the context of the same Health Care Decisions Law provisions that the Court of Appeal in this case misconstrued.

The health care power of attorney at issue in *Garrison*, just like here, provided the daughter was authorized to "'make health care decisions'" for the mother. (*Garrison, supra*, 132 Cal.App.4th at p. 265.) In concluding the daughter had authority to sign the arbitration agreements because they were "executed as part of the health care decisionmaking process," the *Garrison* court relied on three provisions of the Health Care Decisions Law in Probate Code section 4600 et seq. (*Garrison, supra*, 132 Cal.App.4th at pp. 265-266; cf. *Logan v. Country Oaks Partners, LLC* (2022) 82 Cal.App.5th 365, 371-372 ["we are unpersuaded these provisions support that conclusion"].)

The *Garrison* court next relied on section 4684, which provides: "'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. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.'" (*Garrison, supra*, 132 Cal.App.4th at p. 266.)

The Court of Appeal here criticizes that analysis of section 4684, ostensibly because there was "no evidence" in the record from the language of the directive or concerning "personal values" of the principal about the topic of arbitration agreements. (*Logan, supra*, 82 Cal.App.5th at p. 372.) The court then leaps to the conclusion that, in the absence of such "evidence," arbitration must be a prohibited subject matter for an agent to consider when carrying out the purpose of the directive to make health care decisions. (*Ibid*.) The Court of Appeal's conclusion does not follow that illogical premise, which ignores the remainder of section 4684. The plain language of that section was more thoroughly addressed by *Hogan* and *Garrison*. (See Prob. Code, § 4684; *Garrison, supra*, 132 Cal.App.4th at p. 266.)

"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*." (*Hogan, supra*, 148 Cal.App.4th at p. 259, 265, italics added, citing Prob. Code, § 4684 and following *Garrison*'s interpretation of the Probate Code with approval.) Where such "instructions" or "wishes" are not known, then the agent is authorized to determine the course of action that is in the principal's "best

interests." (*Id.* at pp. 265-266; *Garrison, supra*, 132 Cal.App.4th at p. 266.)

Finally, the Court of Appeal rejects the *Garrison* court's citation to section 4688, which "clarifies that if there are any *matters not covered by the Health Care Decisions Law*, the law of agency is controlling." (*Garrison, supra*, 132 Cal.App.4th at p. 266, italics added.) *Garrison* therefore turned to Civil Code section 2319 in addressing the law of agency: "An agent has authority: [¶] 1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency...." (See *Logan, supra*, 82 Cal.App.5th at p. 732.) Relying on this court's decision in Madden, in light of the plain reading of section 4688, *Garrison* held "[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 p. 266.) The Court of Appeal here disagrees, asserting that the directive given to Harrod by his father is not the equivalent of the "agency" that was exercised by the union board when acting as "agent" it made binding agreements to arbitrate disputes arising under a "medical services agreement" with Kaiser on behalf of its individual members. (*Logan, supra*, 82 Cal.App.5th at pp. 732-733.)

The Court of Appeal insists that *Madden* is "distinguishable" for two reasons. First, according to the Court of Appeal the union board acting as "agent" in *Madden*

implicitly had broader powers under "collective bargaining" contracts than a son who is personally entrusted by his father to enter into binding medical services contracts on his behalf as the "agent." (*Logan, supra*, 82 Cal.App.5th at p. 733.) Second, the Court of Appeal found nursing home admission agreements under California law must "decouple" the right to contract for medical services from any agreement to arbitrate once the agreement is fully executed. (*Logan, supra*, 82 Cal.App.5th at p. 733.) Both arguments offer a semantic distinction without a difference.

An "agent" is an agent. The Health Care Decisions Law adopts the general rules of agency where the agreement is silent about the principal's "wishes" or "instructions" about the implementation of health care decisions. The Court of Appeal never explained why a parent who happened to be a union member would place greater trust and confidence in her "union board" than an immediate family member when deciding whether to agree to arbitrate disputes with a medical provider. The union board was acting as "agent" in *Madden*, just as Harrod is acting as the "agent" here.

The "decoupling" argument is similarly unpersuasive. *Hogan and Garrison* debunk that notion. As the *Hogan* court explained:

> Health and Safety Code section 1599.60 et seq. addresses the legal requirements of the contracts to be used on admission of an individual to a long-term health care facility. Section 1599.81 in particular addresses arbitration clauses used in contracts of admission and provides certain

> requirements for the form and content of the same. The statutory framework thus sanctions the use, in contracts of admission, of arbitration clauses meeting those requirements. It necessarily follows that when a representative of a prospective long-term health care facility resident reviews and evaluates contracts of admission with an eye towards deciding whether to place the individual at the facility, that decisionmaking process may include the review and evaluation of arbitration agreements meeting the requirements of Health and Safety Code section 1599.81, if such agreements are presented by the facility. In other words, when an agent under a health care power of attorney is faced with selecting a long-term health care facility, as part of the health care decisionmaking process (Prob. Code, § 4617), he or she may well be asked to decide whether to sign an arbitration agreement as part of the admissions contracts package. The Garrison court was correct in characterizing the execution of the arbitration agreements as "part of the health care decisionmaking process."

(*Hogan, supra*, 148 Cal.App.4th at pp. 267-268.)

Thus, acting in the place of the principal in selecting a skilled nursing facility, the agent's decisionmaking process may (and typically will) include the review and evaluation of arbitration agreements, meeting the requirements of Health and Safety Code section 1599.81. This is the same "decisionmaking process" in which Logan himself would have engaged when presented with the "decoupled" admission and arbitration agreements. That is what the agent does, acting by proxy during the course of "health care decisionmaking" in the same sequence called for by the Health and Safety Code in the context of any admission to a healthcare facility. (*Hogan,*

supra, 148 Cal.App.4th at pp. 267-268; *Garrison, supra*, 132 Cal.App.4th at p. 266.)

The Court of Appeal incorrectly presumes that the Health Care Decisions Law somewhere implies a prohibition on an agent's authority to agree to arbitration when selecting a health care facility. But even assuming that one of those provisions of the Probate Code (or the Health and Safety Code) contained such an express prohibition to sign the "decoupled" agreement—i.e., "an agent is not authorized to agree to arbitration"—Logan's argument fares no better.

Refusing to enforce an agreement to arbitrate disputes with a health care provider that was entered into pursuant to a valid power of attorney would impermissibly "disfavor" arbitration as a method of dispute resolution. Under *Madden*, an agent has broad powers to agree to arbitrate in any contract setting while acting within the "proper and usual" purposes of the agency. Even the case law relied on by the Court of Appeal makes clear (discussed more fully in the sections that follow) any legislation or "judge-made rules" that purport to specifically limit arbitration of disputes executed in the context of admitting a patient to a health care facility—whether contained within the admission agreement itself or "decoupled" as California law provides—would run afoul of FAA preemption.[1]

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[1] The Court of Appeal overlooked this point, even after acknowledging that the agreement Harrod signed is governed by the Federal Arbitration Act, which provides arbitration

III

It is "Proper and Usual" for an Agent to Bind a Principal to an Arbitration Agreement Under a Power of Attorney.

Under Health and Safety Code section 1599.81, subdivision (a), a skilled nursing facility cannot condition the admission of a resident on an agreement to arbitrate. From this requirement, Logan argues that it is not "proper and usual" for an agent under a power of attorney to bind a principal to arbitration. (AB at p. 20.) Logan's argument is a non sequitur; it also ignores *Madden* and common sense.

The theory underlying a power of attorney is to authorize an agent to choose among available options for the benefit of a principal. This is reflected in Probate Code section 4450, which empowers an agent appointed through a power of attorney to make a vast array of choices on behalf of a principal. So the mere fact that arbitration is optional when choosing a skilled nursing facility has no bearing on whether it would be "proper and usual" to choose arbitration.

As *Madden* illustrates, the correct analysis is whether the agent is acting to effect the purpose of the agency. (*Madden, supra,* 17 Cal.3d at p. 707.) Here, the purpose of the agency is to choose (and gain the principal's admission into) a skilled

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agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (*Logan, supra*, 82 Cal.App.5th at p. 730, citing 9 U.S.C. § 2; see also *id.* at fn. 4.)

nursing facility. *Madden* already answers the question of whether opting for arbitration effects that purpose: "The agent today who consents to arbitration follows a 'proper and usual' practice 'for effecting the purpose' of the agency; he merely agrees that disputes arising under the contract be resolved by a common, expeditious, and judicially favored method." (*Ibid.*) Health and Safety Code section 1599.81, subdivision (a) therefore has no effect and it is proper and usual for an agent to elect arbitration.[2]

IV

Garrison Properly Applied the Health Care Decisions Law.

Logan offers a host of reasons why *Garrison* misinterpreted the Health Care Decisions Law. None has merit.

First, Logan argues that *Garrison* "says nothing" about why Probate Code section 4683, which authorizes an agent to

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[2] Logan criticizes *Garrison* for not analyzing "the laws prohibiting nursing homes from conditioning admission on an agreement to arbitrate." (AB at p. 27.) But *Hogan* rejected that precise argument discussing that statutory scheme in detail, relying on *Garrison* and *Madden*. (*Hogan*, *supra*, 148 Cal.App.4th at pp. 267-268.) As explained above, it is irrelevant that arbitration is optional. The principal acting on his or her account would have the power to accept or reject arbitration when choosing the care provider. Likewise, the agent acting under a "power of attorney" is given exactly that same choice in the "decisionmaking process" of selecting a health care provider on the principal's behalf. (*Id.* at p. 268.) The question is whether choosing arbitration *effects the purpose* of the agency. It does.

make the same health care decisions as his or her principal, extends to "unnecessary legal decisions." (AB at p. 27.) But as explained above, section 4683 (and the other Probate Code sections) do not support Logan's theory. There is nothing in the Probate Code that addresses whether agreeing to arbitration is beyond the scope of a power of attorney. And the general principles of agency establish that authority.

Logan then asserts that *Garrison* made a "factual mistake" because "arbitration is not a factor people consider when choosing a nursing facility." (AB at p. 29.) Logan cites to the Court of Appeal's conclusion that "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." (*Logan, supra*, 82 Cal.App.5th at pp. 374-375, citing 84 Fed. Reg. 34727-34728 (2019).) However, federal regulatory history is irrelevant to whether an agent's actions are "proper and usual" under a California power of attorney. The Court of Appeal's rationale cannot withstand even cursory analysis.

Logan then provides a front row view to a parade of horribles: "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." (AB at p. 30.) Hyperbole aside, the above examples do not bear on the purpose of the agency, which was to choose a health care provider. Just as in *Madden,* Harrod acted within the usual and proper scope of his agency in agreeing to arbitration with that provider. Harrod was not being asked to buy a car or make a donation to the building fund. The agent was answering a "usual and proper" question in the same manner as the patient himself would when selecting the provider.

Finally, Logan attempts to rely on (mostly older) pre-*Kindred* out of state authorities that he claims are relevant to an interpretation of California agency law. (See AB at pp. 31-32.) A discussion of a few of the most recent of these decisions is sufficient. In *Miller v. Life Care Ctrs. of Am., Inc*. (Wyo. 2020) 2020 WY 155 [478 P.3d 164], the Wyoming Supreme Court interpreted a narrow power of attorney that authorized the agent to "consent, refuse consent, or withdraw consent to all medical, surgical, hospital and related health care treatments and procedures for [the principal]; the power to make decisions on whether to provide artificial nutrition and hydration to [the principal]; the power to review and receive information regarding [the principal's] physical or mental health; and the power to sign any documents to effectuate those powers." (*Id.* at ¶ 20 [478 P.3d at p. 170].) The power of attorney also stated that the agent "did not have authority to act for [the principal] 'for any other purpose unrelated to [her] health care.'" (*Ibid.*) Interpreting the power of attorney "strictly," the Wyoming

Supreme Court held that "we cannot infer [the agent] had explicit power to sign the Arbitration Agreement …." (*Id.* at ¶ 22 [478 P.3d at p. 171].)[3]

A power of attorney is not interpreted "strictly" in California in the absence of a specific contractual provision *limiting* the agent's authority. Rather, under Civil Code section 2319, an agent is empowered "[t]o do everything necessary or proper and usual . . . for effecting the purpose of his agency." And the Wyoming Supreme Court acknowledged that the result in that case would have been different if such principles were applied. The court distinguished *Kindred Healthcare Operating, Inc. v. Boyd* (Wyo. 2017) 2017 WY 122 [403 P.3d 1014], in which a power of attorney giving the agent broad

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[3] *Miller* distinguishes *Hogan* and *Garrison* as involving an agent's broad authority under California law to agree to arbitrate at the time of a nursing home admission as part of the exercise of their powers in connection with making that "health care decision." (2020 WY 155 at ¶¶ 30-31 [Wyo. 478 P.3d at pp. 172-173] and citing other case law in accord the view that the agency's "purpose" confers that authority.)

The *Miller* court also emphasized that the power of attorney in that case "does not mention arbitration." (2020 WY 155 at ¶ 22 [478 P.3d at p. 171].) Such a fact is irrelevant in California, as *Madden* instructs. (*Madden, supra,* 17 Cal.3d at p. 707 [rejecting the union member's argument that "the authority of an agent to agree to arbitration must be specially conferred"].) By contrast, cases from *other* jurisdictions (including those cited by Logan), interpret their state law as requiring that the agent must receive, in advance, explicit contractual or statutory authority to arbitrate under agency *any* appointment. (See AB at 32 & fn. 14.)

power to sign agreements as "necessary or proper" included the authority to sign an arbitration agreement.

Even some older cases cited by *Miller* (and relied on by Logan; see AB at p. 32), such as *Mississippi Care Ctr. of Greenville, LLC v. Hinyub* (Miss. 2008) 975 So.2d 211 support Country Oaks' position that the agent need not have express authority to agree to arbitrate when seeking to admit his or her principal to a long-term healthcare facility.

According to *Miller*, the Mississippi Supreme Court in *Hinyub* "indicat[ed] execution of an arbitration agreement *is considered a health care decision* and, therefore, *within the authority of a health care agent* when the arbitration provision is required for admission to a long-term care facility … " (*Miller*, 2020 WY 155 at ¶¶ 30-31 [Wyo. 478 P.3d at pp. 171], italics added.) But in that case, the durable power of attorney was not part of the record and could not be construed to confer that power: "Without a durable power of attorney contained within the record, this Court is constrained as a matter of law matter of law to find that Nancy Hinyub did not have authority to bind her father" to arbitrate under the admission agreement. (See *Hinyub*, *supra*, 975 So.2d at p. 217; see also *Arredondo v. SNH SE Ashley River Tenant, LLC* (2021) 433 S.C. 69, 85 [provisions of the power of attorney must clearly and expressly "grant the agent authority to execute a pre-dispute arbitration agreement"]; *LP Louisville E., LLC v. Patton* (Ky. 2021) 651 S.W.3d 759, 776-777 [discussing why the United States Supreme Court in *Kindred* held that Kentucky's "'clear-

statement' rule" requiring that the agent's power to arbitrate be spelled out clearly in the power of attorney "singles out arbitration for disfavored treatment, and accordingly violates the FAA"].)

V

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

Logan argues that "*Kindred* does not transform arbitration into a 'health care decision.'" (AB at p. 34.) That is not—and never has been—the issue before this court. Rather, *Kindred* becomes relevant only if this court holds, under state law, that the power of attorney did not authorize Harrod to agree to arbitration. If so, then the issue is whether, under *Kindred* and the Federal Arbitration Act (FAA), this arbitration agreement is being singled out for disfavored treatment.

Logan contends that "[t]his case does not involve any judge-made rule targeting arbitration; it simply requires interpreting state law using the commonplace, neutral principles of construction …." (AB at p. 35.) If the Court of Appeal's opinion in this case is any barometer, it is a paradigm example of a judge-made rule that targets arbitration. Contrary to well established rules of agency law, the Court of Appeal concluded that "an agent [who] is permitted to make health care decisions to the same extent as the principal says 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." (*Logan, supra,* 82 Cal.App.5th at p. 372.)

Without a doubt, the Court of Appeal's holding "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.)

Better reasoned cases, adopting the analysis of *Madden, Garrison* and *Hogan*, have reached the same common sense conclusion that a decision to arbitrate disputes arising in the context of the patient's placement in a healthcare facility is a matter within the "proper and usual" course of the agent's "healthcare decisionmaking" authority. These and numerous other courts reject the Court of Appeal's tautology that an agreement to admit the patient is a "healthcare decision" while the agreement to arbitrate is merely a "legal decision."

As the Tennessee Supreme Court in *Owens v. Nat'l Health Corp.* (Tenn. 2007) 263 S.W.3d 876 soundly reasoned when rejecting the "legal decision" versus "health care decision" canard:

> The plaintiff's argument on this issue is faulty …. Her purported distinction between making a legal decision and a health care decision fails to appreciate that signing a contract for health care services, even one without an arbitration provision, is itself a "legal decision." The implication of the plaintiff's argument is that the attorney-in-fact may make one "legal decision," contracting for health care services for the principal, but not another, agreeing in the contract to binding arbitration. That result would be untenable. Each provision of a contract signed by an attorney-in-fact could be subject to question as to whether the provision constitutes an authorized "health care decision" or an unauthorized "legal decision." Holding that an attorney-in-fact can make some

> "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact that likely would have negative effects on their principals. Such a holding could make it more difficult to obtain health care services for the principal. And in some cases, an attorney-in-fact's apparent lack of authority to sign an arbitration agreement on behalf of the principal presumably could result in the principal being unable to obtain needed health care services.

(*Id*. at p. 879.)

The reasonable interpretation of contracts in this State, regardless of the subject matter, is entirely about "context." (*Bay Cities Paving Grading v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) The context of the arbitration agreement in this case, as in *Hogan* and *Garrison*, was the incapacitated patient's treatment at a medical facility. "Shorn of context, signing a stand-alone arbitration agreement is a legal decision. Here, however, it is undisputed that the [Admission] Agreement was executed in the context of Decedent's admission to [the nursing home]." (*Williams v. Smyrna Residential, LLC* (Tenn. Ct. App. 2022) 2022 WL 1052429 at p. 6 [nonpub. opn.], citing *Owens*.)

Logan's "decoupling" argument—under any California or federal regulatory requirement that agreements to arbitrate the disputes over medical services in a custodial care setting must be separately presented—actually enhances the enforceability of the agent's agreement to arbitrate in this case. There is no "unequal bargaining" or mystery about signing an admission agreement requiring arbitration on a take-it-or-leave

it basis. Whether the provision containing the right to arbitrate disputes with the healthcare provider is presented to the patient (Logan) or his surrogate-agent (Harrod), neither of them is obliged to accept that method of dispute resolution concerning those healthcare services. The extensive legislative history and amici arguments in *Hogan* bear out the Legislature's intent to enhance the understanding of any contracting party in the specific context of admitting a patient to a long-term care facility. (*Hogan, supra*, 148 Cal.App.4th at pp. 267-268.)

This increased level of transparency in the nursing home admission process does nothing to diminish the agent's authority. In seeking admission to a nursing home, as in other contexts where an agent contracts for "medical services" on behalf of his or her principal, California rejects any clear-statement rule requiring that "the authority of an agent to agree to arbitration must be specially conferred." (*Madden, supra*, 17 Cal.3d at p. 707.)

But that is precisely what Logan is urging should be the "law" in California, whether by interpreting the Health Care Decisions Laws or altering the rules of agency derived from *Madden*'s teachings almost four decades ago.

Consistent with the FAA, the Legislature would be unable to craft a "rule" that completely avoided (or even "disfavored") binding arbitration contracts entered into by a patient's authorized agent with a healthcare provider. (See, e.g., *Valley View Health Care, Inc. v. Chapman* (E.D. Cal. 2014)

992 F.Supp.2d 1016, 1039-1040 [permanently enjoining California regulations prohibiting the arbitration of Patient Bill of Rights claims contrary to the FAA]; see also opening brief on the merits at pp. 22-29 [digesting other cases].)

Logan chooses to ignore the recent Ninth Circuit opinion in *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2023) 62 F.4th 473. After first observing that the United States Supreme Court "has struck down a number of California laws or judge-made rules relating to arbitration as preempted by the FAA" (*id.* at p. 478), the panel reversed its prior opinion and held that the FAA preempts Assembly Bill No. 51. That bill enacted or amended statutes that made it a crime for an employer to require employees or applicants to consent to arbitration as a condition of employment. As in *Kindred,* the bill derived its meaning from an agreement to arbitrate because it "disfavors the formation of agreements that have the essential terms of an arbitration agreement." (*Id.* at p. 486.)

The same is true here. As in *Kindred*, the Court of Appeal's opinion disfavors the enforcement of arbitration agreements through a judge-made exception to generally applicable laws. Even Logan concedes that such an exception could not withstand scrutiny under *Kindred* and the FAA. (See AB at pp. 4 and 38, & fn. 18.)

CONCLUSION

The Court of Appeal's opinion is contrary to this court's opinion in *Madden* and better reasoned opinions such as *Garrison* and *Hogan*. 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 with directions to grant the petition to compel arbitration.

Respectfully submitted,

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

Counsel for defendants and appellants hereby certify that this opening brief on the merits contains 5,752 words as measured by the word processing software program used to create this document.

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(Code Civ. Proc., § 1013a, subd. (3))

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Supreme Court of California

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