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.

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

Application for Leave to File Brief of *Amici Curiae*; Brief of *Amici Curiae* California Medical Association, California Dental Association, and California Hospital Association

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Rules

Application for Leave to File Brief of *Amici Curiae*

Under California Rule of Court 8.520(f), the California Medical Association, California Dental Association, and California Hospital Association (together, the *Amici*) request permission to file the attached Brief of *Amici Curiae* in support of Defendants and Appellants Country Oaks Partners, LLC, dba Country Oaks Care Center and Sun Mar Management Services, Inc. *Amici*'s brief addresses the various conflicts raised by the Court of Appeal's decision and the impact that erroneous holding will have on those engaged in the healthcare and long-term care sectors, which are only growing in the State. These issues are of great interest to *Amici*.

I. Interests of *Amici Curiae*

California Medical Association (CMA) is a non-profit, incorporated professional physician association of approximately 50,000 member physicians practicing in California across all areas and specialties. California Dental Association (CDA) represents over 27,000 California dentists—70% of dentists practicing in the state. CMA's and CDA's membership includes most of the physicians and dentists engaged in private practices of medicine and dentistry in California.

California Hospital Association (CHA) is a nonprofit organization dedicated to representing the interests of California hospitals and health systems, as well as the patients they serve. CHA represents more than 400

hospital and health system members, which have approximately 94% of the patient hospital beds in California and include acute care hospitals, county hospitals, rural hospitals, academic medical centers, children's hospitals, psychiatric hospitals, nonprofit hospitals, investor-owned hospitals, and multi-hospital health systems.

Together, CMA, CDA, and CHA represent a wide variety of members of the health care-providing community affected by the issues in this case.

Some funding for this brief was provided by organizations and entities that share *Amici*'s interests, including physician-owned and other medical and dental professional liability organizations and nonprofit and governmental entities engaging physicians for the provision of medical services, specifically: the Cooperative of American Physicians, Inc. (through the Mutual Protection Trust); The Doctors Company; The Dentists Insurance Company; Kaiser Foundation Health Plan, Inc.; Medical Insurance Exchange of California; NORCAL Insurance Company; and the Regents of the University of California.

No party or counsel for a party authored this Brief in whole or in part, nor has any party or counsel for any party made a monetary contribution intended to fund this Brief's preparation or submission.

II. Need for Further Briefing

This case involves an important question of whether the decision to arbitrate is a "health care decision" that can be made by a patient's agent acting under a health care directive. The eventual decision by this Court has the potential to substantially impact resolution of claims related to the provision of medical and long-term care in the State.

Counsel for *Amici* have reviewed Appellant's Opening Brief on the Merits, the Answer Brief on the Merits of Respondent Charles Logan, and Appellant's Reply Brief on the Merits. Appellants' briefs discuss many issues directly affecting *Amici* and their involvement in the medical and long-term care industries in California. *Amici* thus support these points in Appellants' Brief.

Reversing the decision below and curing the split created by the Second Appellate District goes further than just resolving the dispute between Appellants and Respondent. It will have far-reaching and long-term consequences for how California's long-term, skilled, and nursing care facilities address issues involving health care directives and decisions by those with power of attorney for patients and residents. If Respondents prevail, it will result in a flood of litigation that is otherwise properly resolved through the arbitral forum.

Amici submit that this Court will benefit from additional briefing. This brief supplements, but does not duplicate, the parties' briefs. Instead, it

discusses in detail the conflicting law below, the status of medical and long-term care in California, and the potential ramifications of not reversing.

The court below incorrectly held that the decision to arbitrate made by an agent under a health care directive is not a "health care decision." This Court should correct this error. Doing so will resolve a split in authority, provide clarity to families and providers in California, and hew to California's preference for efficient resolution of claims through arbitration.

Respectfully submitted,

Dated: June 1, 2023

TUCKER ELLIS LLP

By: */s/Traci L. Shafroth*
Traci L. Shafroth

Counsel for Amici Curiae *California Medical Association, California Dental Association, and California Hospital Association*

[Proposed] Order

IT IS HEREBY ORDERED that California Medical Association, California Dental Association, and California Hospital Association's (*Amici*) Application for Leave to File Brief of *Amici Curiae* is GRANTED and that *Amici* are permitted to file the proposed brief combined with the application.

IT IS HEREBY FURTHER ORDERED that the Brief of *Amici Curiae* California Medical Association, California Dental Association, and California Hospital Association in Support of Appellants (Brief of *Amici Curiae*) be deemed filed with the Court as of the date of this Order.

IT IS HEREBY FURTHER ORDERED that any answer to the Brief of *Amici Curiae* be filed within ___ days of the filing of this Order.

DATED: _____, 2023

_____
Presiding Justice of the Supreme Court
of the State of California

Brief of *Amici Curiae*

I. Introduction

The key question in this case is whether an agent operating under an advance health care directive and power of attorney for health care decisions has the implied authority to enter an arbitration agreement on behalf of the principal. This Court made clear more than 40 years ago that "an agent or other fiduciary who contracts for medical treatment on behalf of his beneficiary retains the authority to enter into an agreement providing for arbitration of claims for medical malpractice." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 669, 709 (*Madden*).)

The Courts of Appeal followed this statement as black letter law for decades, affirming that a durable power of attorney for health care that authorizes the agent to make "health care decisions" encompasses the authority to execute an arbitration agreement on behalf of the patient. (*Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 264, 267 (*Garrison*); see also *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259 (*Hogan*) [recognizing *Garrison* as controlling precedent and holding that a health care power of attorney that authorized the agent to make health care decisions and did not "exclude the power to enter into arbitration agreements" authorized the agent to execute such agreements].)

In the courts below, Appellants Country Oaks Partners, LLC, dba Country Oaks Care Center, and Sun Mar Management Services, Inc.,

(together Country Oaks) sought to enforce an arbitration agreement that Respondent Charles Logan's agent, his nephew Mark Harrod, signed on his behalf under an advance health care directive and durable power of attorney that authorized Mr. Harrod to make health care decisions for Mr. Logan. (*Logan v. Country Oaks Partners, LLC*, (2022) 82 Cal.App.5th 365, 371 (*Logan*).) The trial court denied Country Oaks' motion to compel arbitration. Division Four of the Second District affirmed, holding that Mr. Harrod lacked authority to bind Mr. Logan to arbitration with Country Oaks.

In holding that the decision to enter the agreement was not a "health care decision," the Court of Appeal purported to distinguish *Madden*, *Garrison*, and *Hogan*, opting instead to follow dicta in *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1124 (*Young*).

The *Logan* Court simply got it wrong, and in doing so, it created a clear split with other published authority that, if left unresolved, will create ambiguity in and inconsistent application of the law, not to mention a deluge of litigation in the trial courts that should instead be resolved through arbitration.

Logan also arguably conflicts with the Federal Arbitration Act (9 U.S.C. § 2) (FAA) under the United States Supreme Court's decision in *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 581 U.S. 246, 137 S. Ct. 1421 (*Kindred Nursing*). The *Kindred Nursing* court overruled a

Kentucky Supreme Court decision that required an explicit statement in a power of attorney that the agent has authority to waive the principal's right to access the courts and to a jury trial, holding that the rule disfavored arbitration agreements and therefore was preempted by the FAA. (*Id*. at p. 248.)

Here, similarly, the *Logan* court's interpretation of the relevant sections of the Probate Code would require that a power of attorney for health care decisions include an explicit statement that the agent has authority to enter arbitration agreements, unlike other agreements relating to the principal's care. And the decision in *Logan* results in judicial disfavoring and singling-out of arbitration agreements, contravening *Kindred Nursing*.

II. Argument

A. The Court of Appeal's Decision is Contrary to Existing Law.

Garrison held that the decision to arbitrate, when made under an advance medical directive and power of attorney for health care, is a "health care decision" and is therefore authorized under the Health Care Decisions Law in Probate Code section 4600 et seq. (*Garrison, supra,* 132 Cal.App.4th at pp. 265–66.) It has, for seventeen years, permitted efficient arbitration of claims just like the one at issue here.

In *Garrison*, Division Five of the Second District held that a mother's designation of her daughter in durable power of attorney for health care authorized the daughter to enter into binding arbitration. (*Garrison*, *supra*, 132 Cal.App.4th at p. 256.) As part of the patient's admission to a residential care facility, the daughter executed two arbitration agreements. (*Id.* at pp. 256–57.) The patient later sued for elder abuse and medical malpractice and the facility moved to compel arbitration. (*Id.* at pp. 257–61.) The trial court rejected the patient's argument that the daughter was not authorized to enter into the arbitration agreements and granted the motion. (*Ibid.*)

In affirming, the Second District looked first to the *Madden* court's "black letter statement of California law," which holds that "an agent or other fiduciary who contracts for medical treatment on behalf of his beneficiary retains authority to enter into an agreement providing for arbitration of claims for medical malpractice." (*Garrison*, *supra*, 132 Cal.App.4th at p. 264 [quoting *Madden*, *supra*, 17 Cal.3d at p. 709].)

The court next addressed three controlling provisions of the Health Care Decisions Law in Probate Code section 4600 et seq. (*Id*. at pp. 264–66.) First, under Probate Code section 4683, subdivision (a), a principal's agent may make health care decisions under the health care power of attorney to the same extent that the principal could if the principal had capacity to do so. (*Id*. at pp. 265–66.) Second, Probate Code section 4684

states that the agent shall make health care decisions in accordance with the principal's instructions, if any, and wishes, if known; otherwise, the agent is to make decisions in accordance with the agent's determination of the principal's best interest. (*Id*. at p. 266.) Third, Probate Code section 4688 directs that where the Health Care Decisions Law "does not provide a rule governing agents under powers of attorney, the law of agency applies." (*Ibid*.)

Finally, consistent with *Madden* and Probate Code section 4688, the court looked to the law of agency. (*Garrison*, *supra*, 132 Cal.App.4th at p. 266.) Under Civil Code section 2319, the agent has authority "[t]o do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency . . . ." (*Ibid*.) The court concluded, consistent with *Madden*, that "[t]he decision to enter into optional revocable arbitration agreements in connection with placement in a health care facility . . . is a 'proper and usual' exercise of an agent's powers. (*Ibid*.) While *Madden* involved "slightly different facts" (in that the agent was a state board negotiating a medical services contract on behalf of state employees (17 Cal.3d at p. 702)), its analysis of the "'proper and usual' nature of selecting arbitration as part of an agent's selection of health care options [wa]s directly pertinent to th[e] case." (*Garrison*, *supra*, 132 Cal.App.4th at p. 267.)

The *Garrison* court concluded that under the combined effect of *Madden*, Probate Code sections 4683, 4684, and 4688, and agency law, the daughter had the authority to enter into the arbitration agreements on behalf of the patient. (*Garrison*, *supra*, 132 Cal.App.4th at pp. 266–268.)

Two years later, in *Hogan*, the Fourth District followed *Garrison* in holding that a mother's grant of power of attorney via a health care directive "impliedly included the power to execute contracts of admission," and that power extended to "enter[ing] into arbitration agreements" as part of that admissions process. (*Hogan*, *supra*, 148 Cal.App.4th at p. 262 [analyzing *Garrison* at length and concluding that it "is well reasoned" and that the trial court "erred in disregarding" it].) The *Hogan* court determined that *Garrison* provided clear guidance that (1) the decision to arbitrate was indeed "part of the health care decision making process" and (2) application of general agency principles bolstered that outcome because "an agent or fiduciary who makes medical care decisions retains the power to enter into an arbitration agreement. [Citations.]" (*Id*. at p. 266.)

Contrary to *Garrison* and *Hogan*, the court below held that "the decision to waive a jury trial and instead engage in binding arbitration . . . is not a health care decision. Rather it is a decision about how disputes over health care decisions will be resolved." (*Logan*, *supra*, 82 Cal.App.5th at p. 372.) The *Logan* court expressly refused to follow *Garrison* and *Hogan*, relying instead on acknowledged dicta in *Young*, *supra*, 220 Cal.App.4th at

p. 1129, in which the Sixth District disagreed with the *Garrison* court's conclusion that the execution of an arbitration agreement constitutes a health care decision. (*Logan, supra,* 297 Cal.Rptr.3d at p. 909, fn.5.) *Logan*'s holding creates a clear split of authority that this Court should resolve.

Moreover, the *Logan* court's decision cannot be squared with this Court's reasoning in *Madden*. In support of its holdings, the *Madden* court analogized to *Doyle v. Giuliucci* (1956) 62 Cal.2d 606, in which the Court held that the implied authority of a parent to contract for medical services for the parent's minor child "includes the power to agree to arbitration of the child's malpractice claims." (*Madden, supra,* 17 Cal.3d at pp. 708–09.) That being so, the *Madden* court could "perceive no reason why the implied authority of an agent should not similarly include the power to agree to arbitration of the principal's malpractice claims." (*Id*. at p. 709.) The same is true here.

The *Logan* court purported to distinguish *Madden* on the ground that the arbitration provision here was not included in the admission agreement, but was instead included in a separate, optional arbitration provision. (*Logan, supra,* 82 Cal.App.5th at p. 373.) According to *Logan,* because the decision of whether to admit the patient had been "decoupled" from the decision to enter the arbitration agreement, there was nothing "necessary or proper and usual' about signing the arbitration agreement "for effecting the

purpose of" Mr. Harrod's agency. (*Ibid*.) But the *Madden* holding cannot be limited in this way. *Madden* analyzed at length the importance of arbitration agreements and concluded, broadly: "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." (*Madden, supra*, 17 Cal.3d at p. 707.) This holding applies whether the disputes arising under the contract for medical services are resolved by arbitration agreed to under that contract or under a separate agreement entered into at the same time and regarding the same services.

Logan's flawed attempt to distinguish *Madden* provides another reason for this Court to grant review: to secure uniformity of decision and settle this important legal question.

B. Logan Conflicts with Kindred Nursing.

In *Kindred Nursing*, the United States Supreme Court reversed a Kentucky Supreme Court decision that contravened the FAA. The FAA establishes that a court may not invalidate an arbitration agreement based on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" [Citation] (*Kindred Nursing, supra,* 581 U.S. at p. 251.) The Court held that the Kentucky high court contravened the FAA by crafting a "clear-statement rule," under which an agent could not validly execute an arbitration agreement unless

the power of attorney under which he or she operated explicitly granted that authority. (*Ibid*.) The rule, meant to "safeguard a person's right to access the courts and to trial by jury," singled out arbitration contracts for disfavored treatment and therefore violated the FAA. (*Id*. at p. 1427.)

Here, the Court of Appeal has crafted a rule that similarly disfavors arbitration agreements. Despite the advance directive's grant of the "full power and authority" to make all "health care decisions," the court narrowly interpreted the relevant sections of the Probate Code as defining health care decisions directly affecting the principal's "physical or mental health." (*Logan*, *supra*, 82 Cal.App.5th at pp. 369–73.) The court then held that "[t]he decision to waive a jury trial and instead engage in binding arbitration does not fit within these definitions. It is not a health care decision. Rather it is a decision about how disputes over health care decisions will be resolved." (*Id.* at p. 372.) The court acknowledged that an arbitration agreement cannot be included in most nursing facility admission agreements because facilities that accept Medicare or Medicaid may not condition admission on agreeing to binding arbitration. (*Id*. at p. 373–75.) Yet the court nonetheless held that the placement of the arbitration agreement in a separate contract from the admission agreement "decoupled" it from the "health care decision," which the court narrowly defined as "whether to consent to admission into the skilled nursing facility." (*Id.* at p. 373.) Because arbitration agreements in this context

generally must be entered in a separate agreement from the admission agreement, the court's rule singles out arbitration agreements for disfavored treatment. And doing so, it runs afoul of the FAA and *Kindred Nursing*.[1] (See *Kindred Nursing*, 581 U.S. at pp. 252–54.)

C. Arbitration is Good Public Policy.

As the *Madden* court emphasized, "Under the aegis of permissive legislation and favorable judicial decisions, arbitration has become a proper and usual means of resolving civil disputes, including disputes relating to medical malpractice." (*Madden*, *supra*, 17 Cal.3d at p. 714.) Statutes such as the California Arbitration Act (C.C.P. § 1280 et seq.) demonstrate "a strong public policy in favor of arbitrations. (*Madden*, *supra*, 17 Cal.3d at p. 706; see also, e.g., *Epic Sys. Corp. v. Lewis* (2018) 138 S. Ct. 1612, 1621 [the Federal Arbitration Act establishes "a liberal federal policy favoring arbitration agreements"].) And in the healthcare context, arbitration offers a simple, cost-effective, and efficient way to resolve claims, simultaneously preserving the resources of health care providers and promoting judicial economy. Reversing the decision below serves these broad goals.

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[1] The Ninth Circuit has recently addressed the applicability of *Kindred Nursing* in California. (*Chamber of Commerce v. Bonta*, (9th Cir. 2023) 62 F.4th 473.) There, the court held that a proposed change to the California Labor Code, Assembly Bill 51—which "effectively bar[red] an employer from requiring an employee or applicant for employment to enter into an agreement to arbitrate certain claims as a condition for being hired or for keeping a job"—was preempted by the Federal Arbitration Act. (*Id.* at pp. 480, 490.)

Arbitration in this context is of paramount importance to CMA, CHA, and CDA because—as representatives of providers across the health care system—excessive litigation costs will strain an already overburdened system, while offering no meaningful benefit to patients. Studies have demonstrated that litigation has little to no impact on quality of the provision of care. (See generally Konetzka, Sharma & Park, *Malpractice Environment vs. Direct Litigation: What Drives Nursing Home Exit*, 55 INQUIRY: A JOURNAL OF MEDICAL CARE ORGANIZATION, PROVISION, AND FINANCING (2018)). Instead, litigation transfers costs directly onto providers, and indirectly onto all Californians through increased insurance premiums.

Against the threat of increased costs and litigation against health care providers is the fact that California is on the precipice of a surge in its elderly population, which will increase the need for medical, skilled nursing, and acute care. By 2030, 10.8 million people over the age of 65 will reside in California—double the number from 2010. (See Governor's Master Plan for Aging (Jan. 2021), available at https://mpa.aging.ca.gov/.) Recognizing the elderly population is only growing, the first goal of the Governor's plan is to provide "millions of new housing options" for California's older adults. *Id.* at p. 6. Yet at the time of the Governor's study, approximately 95,000 Californians lived in nursing homes and long-term

care and residential care facilities for the elderly were only licensed to serve an additional 300,000 Californians. *Ibid.*

Addressing this growing need—and the inevitable disputes that will arise from the provision of health care for the elderly—makes arbitration all the more important. The specter of constant litigation against nursing homes, skilled care facilities, and acute care centers is effectively mitigated through arbitration, which offers an inexpensive and efficient method to resolve disputes. Arbitration achieves the dual purpose of fairly compensating those who have been truly wronged while preventing potentially frivolous litigation, lawyer-driven suits, and runaway jury verdicts.

Allowing arbitration in this context also avoids requiring skilled care employees to try to make ad hoc legal determinations of the scope of a power of attorney. The decoupling that the lower court suggests would require, at patient admission, that every health care intake employee become a de facto legal advisor. If a health care directive or power of attorney were at issue, the facility would be faced with the choice of foregoing arbitration entirely, having an executed arbitration agreement later be determined invalid, *or* make a legal assessment of the scope of the power of attorney's agency.

Separately, construing a health care directive or power of attorney like the one at issue here in the narrowest sense constrains the agent to only

take actions that are *strictly* necessary. (*See* Respondent's Br. at pp. 12–14.) This reduction in discretionary decision-making handicaps the agent's authority to make care decisions that are not strictly necessary, but may be helpful, appropriate, or experimental. (See Thomas E. Simmons, *The Intersection of Agency Doctrine and Elder Law*, 49 J. MARSHALL L.R. 39, 55 (2015).) These non-necessary but nevertheless helpful decisions could include "acupuncture, massage therapy, personal care attendants, aromatherapy, reflexology, dietary counseling, companionship services, or even second opinions or atypical diagnostic procedures." (*Id.*) "None of these" services are "truly necessary for an individual's healthcare," (*id.*) but under Respondent's construction of the health care directive, would be excluded (Respondent's Br. at pp. 12–14 [noting "the Advance Health Directive in this case expressly enumerates … only four types of decisions that the 'agent will have the right to make' consistent with their agency"]). Construing things as strictly as Respondents want creates more problems than it solves.

III. Conclusion

For these reasons, and those expressed by Appellants in their Opening Brief, the Court should reverse the decision below and hold that the decision to arbitrate is within the agent's power under California Probate Code § 4600 et seq.

Respectfully submitted,

Dated: June 1, 2023

TUCKER ELLIS LLP

By: */s/Traci L. Shafroth*
Traci L. Shafroth

Counsel for Amici Curiae *California Medical Association, California Dental Association, and California Hospital Association*

Certificate of Compliance

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,105 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,

Dated: June 1, 2023

TUCKER ELLIS LLP

By: */s/Traci L. Shafroth*
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Counsel for Amici Curiae *California Medical Association, California Dental Association, and California Hospital Association*

Proof of Service

I, the undersigned, declare that I am over the age of eighteen years and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 201 Mission Street, Suite 2310, San Francisco, CA 94105.

On June 1, 2023, I served true copies of the foregoing document described as:

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on the interested parties in this action as follows:

See attached Service List

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

Executed on June 1, 2023, at San Francisco, California.

/s/Debi Dilling

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S276545**
Lower Court Case Number: **B312967**

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

6/1/2023

Date

/s/Debi Dilling

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