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.

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA, COMPASSION & CHOICES, AMERICAN ASSOCIATION FOR JUSTICE, AND PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF AND RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons who must be listed in this certificate under Cal. Rules of Court, rule 8.208(e)(3.)

June 5, 2023

STILLER LAW FIRM

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), Consumer Attorneys of California, Compassion & Choices, American Association for Justice, and Public Justice respectfully request leave to file the attached amici curiae brief in support of plaintiff and respondent, Charles Logan.

Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals suffering from personal injuries, consumer fraud, insurance bad faith, antitrust violations, business-related torts, and employment violations. CAOC has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature, including those injured through medical malpractice in the nursing home industry.

Compassion & Choices is a non-profit organization that works in legislatures, courts, and in communities to ensure that everyone can receive high quality end-of-life care in line with their values and priorities. Its services include educating the public about the importance of end-of-life planning and the full range of end-of-life services; advocating for policies that empower people to make their own healthcare decisions; promoting medical practices and systems that prioritize patients and that advance greater equity in end-of-life care; and defending against

efforts to restrict access to existing end-of-life options or impede patient-directed care.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in California actions for elder abuse and negligence. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice specializes in precedent-setting, socially significant civil litigation, one focus of which is fighting to preserve access to justice within the civil court system for victims of corporate and governmental misconduct.

Proposed amici have an abiding interest in the development of California law to protect the personal autonomy of injured patients like Mr. Logan. Amici and their members seek to ensure that appointed health care agents honor a principal's autonomy by strictly adhering to the authority granted in an advance directive.

The following proposed brief does not restate the same arguments made by the parties, but instead aims to assist the Court by discussing new authorities and lines of reasoning that compel a narrow interpretation of the Health Care Decisions Law. The brief discusses caselaw, including this Court's decision in *Conservatorship of Wendland* (2001) 26 Cal.4th 519, strictly interpreting health care agency rights to honor the wishes of an incapacitated principal. The brief also addresses legislative history, beyond what the parties cite, bolstering Mr. Logan's argument that health care agency is intended to facilitate medical treatment decisions, not forum selection for legal disputes. The brief includes an in-depth analysis of the next-of-kin cases mentioned by both parties and, finally, adds to Mr. Logan's argument that the Federal Arbitration Act does not preempt California's generally applicable agency laws.

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Pursuant to California Rules of Court, rule 8.520(f)(4), amici filing this brief affirm that no party or counsel for a party to this appeal authored any part of this proposed amicus brief. No person other than proposed amici and their counsel made any monetary contribution to the preparation or submission of this brief. For the reasons stated above, Consumer Attorneys of California, Compassion & Choices, American Association for Justice, and Public Justice respectfully request leave to file the following proposed amicus brief.

June 5, 2023

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INTRODUCTION

Charles Logan's authorization for his nephew to make "health care decisions" on his behalf did not include the power to agree to arbitration for legal disputes arising from Mr. Logan's care. The Legislature enacted the Health Care Decisions Law so that Californians could make their treatment wishes known and effective when they are incapacitated, separate from the procedure for appointing a general agent. The law's purpose of preserving the personal autonomy of patients like Mr. Logan would be undermined if a health care agent could bind the principal to forum selection or other legal decisions outside the narrow authority that the principal would reasonably expect.

Legislative history from the California Law Revision Commission, which drafted the Health Care Decisions Law, cements the point that "health care decisions" within an advance directive are intended to facilitate treatment when the principal is incapacitated—not to select a forum for legal claims brought later on. The Commission's final report repeatedly refers to health care decisions as "treatment decisions" but only refers to arbitration and broader contracting rights as being held by agents under a general power of attorney. Mr. Logan's interpretation finds further support in a body of law from the Court of Appeal holding that the authority of an individual's next-of-kin to make health care decisions does not include agreeing to arbitration.

The present dispute hinges on California's agency principles, which are not preempted by the Federal Arbitration

Act. In that respect, this case mirrors *Arredondo v. SNH SE Ashley River Tenant, LLC*, where the South Carolina Supreme Court found a health care power of attorney not to encompass the right to agree to arbitration under general contract principles, and the United States Supreme Court denied certiorari.

ARGUMENT

A. Courts Should Interpret Advance Directives Strictly to Preserve Personal Autonomy

The Court should interpret directives under the Health Care Decisions Law strictly to honor the autonomy of a patient without capacity to make treatment decisions. This Court addressed the Health Care Decisions Law at length in *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 530–531. In that matter, the Court found that the law's purpose of protecting autonomy would not be served by allowing a conservator to remove a conservatee's artificial nutrition and hydration without showing through clear and convincing evidence that doing so is consistent with the conservatee's known wishes or best interests. (*Id.* at pp. 546–548.)

In reaching that conclusion, the Court interpreted the Health Care Decisions Law narrowly. It linked the right to medical decisionmaking directly to an individual's constitutionally protected right of personal autonomy. The law includes important restrictions to ensure that one who executes an advance directive retains control of their own health care, binding the agent to make only those health care decisions the

principal would have made for themselves if they still had capacity. Advance directives made under the Health Care Decisions Law should thus be interpreted to grant an agent only the scope of authority the principal intended when executing the directive. Any action exceeding the principal's intended grant of power undermines the principal's personal autonomy and should not be permitted.

1. Advance Directives, Which Include the Designation of a Health Care Power of Attorney, Protect and Effectuate an Individual's Personal Autonomy in Case of Future Incapacity

Nearly half a century ago, California became the first state to adopt an advance directive statute, recognizing the fundamental right of adults "to control the decisions relating to the rendering of their own medical care." (Health & Saf. Code § 7185 et seq.) California has since modernized its legislative scheme with the Health Care Decisions Law, which aims to "improve the effectuation of patients' wishes once they become incapable of making their own health care decisions." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 891 (1999–2000 Reg. Sess.) April 20, 1999.) In the almost five decades since California first passed its groundbreaking law, the underlying value driving California's statutory recognition and legal protection of advance directives has remained consistent: to preserve and advance an individual's personal autonomy in case of future incapacity.

This value of personal autonomy motivated the California Legislature to pass the improved Health Care Decisions Law in 1999. (Prob. Code § 4600 et seq.) The Legislature, in reimagining its advance directive statute, sought to establish a "uniform standard of decisionmaking for adults without decisionmaking capacity," binding all surrogate decisionmakers—whether a Power of Attorney for Health Care, a conservator, or otherwise—to make health care decisions in accordance with the principal's known wishes or best interests. (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 891 (1999–2000 Reg. Sess.) April 20, 1999.) This standard of decisionmaking "ensure[s] that as much as possible the incapacitated patient's desires and values are considered," preserving an individual's ability to direct their own health care and receive only the care they would have wanted in the event of future incapacity. (Sen. Judiciary Com., Rep. on Assem. Bill No. 891 (1999–2000 Reg. Sess.) July 13, 1999.)

These interests and rights underpinning the Health Care Decisions Law are so foundational they are enshrined in the California Constitution. (Cal. Const., art. I, § 1.) The Legislature acknowledged the fundamental nature of the rights protected in the law, declaring in its legislative findings that, "[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 healthcare." (Prob. Code § 4650, subd. (a).) This right to make health care decisions "involves fundamental liberty interests, as well as privacy interests," and is constitutionally protected. (*California Advocates*

for Nursing Home Reform v. Smith (2019) 28 Cal.App.5th 838, 866.) The Health Care Decisions Law furthers these fundamental rights and "may accurately be described, as the Legislature has described them, as a means to respect personal autonomy by giving effect to competent decisions." (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 534.)

2. Limitations on an Agent's Powers Are Important to Ensuring a Principal's Wishes Are Effectuated

The Health Care Decisions Law places important restrictions on an agent's powers to ensure the principal's personal autonomy will be furthered and their individual wishes effectuated. These limitations dictate what decisions an agent can make on a principal's behalf and the standards by which an agent is bound to make such decisions.

Agents under the Health Care Decisions Law are not general agents. They are appointed to make health care decisions and nothing else. (Prob. Code § 4617.) While "[t]he power of attorney for health care may authorize the agent to make health care decisions and may also include individual health care instructions," an agent cannot cite authority under the Health Care Decisions Law to make any decision outside that finite and expressly delineated realm. (Prob. Code § 4671, subd. (a).) Consequently, when a principal executes an advance directive, they do so with the intent and expectation of granting the agent that specifically limited authority to make only health care decisions on the principal's behalf in case of future incapacity.

An agent is further limited to make health care decisions aligning with the principal's known wishes or best interests. (Prob. Code § 4684.) The determination of an individual's known wishes and best interests requires a subjective, not objective, analysis of what the principal would have wanted for themselves. The purpose of this standard "is to enforce the fundamental principle of personal autonomy," making sure an agent is properly fulfilling their role to effectuate the wishes of the principal, "as opposed to the interests of the hospital, the physicians, the legal system, or someone else." (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at pp. 537, 545.) The fundamental interest in personal autonomy "means that incompetent persons have a right, based in the California Constitution, to appropriate medical decisions that reflect their *own* interests and values." (*Id.* at p. 537, emphasis in original.) Every health care decision an agent makes on a principal's behalf must follow this standard.

3. The Court Should Interpret Advance Directives Strictly to Enhance and Protect a Principal's Autonomy

Advance directives created under the Health Care Decisions Law should be interpreted in a way that furthers the principal's intent in executing the document. To construe an advance directive to grant power beyond that which the principal intended, or even contemplated, at the time of execution would undermine the principal's personal autonomy and frustrate the Legislature's intent in creating the Health Care Decisions Law.

Individuals execute an advance directive understanding their agent will adhere to the statutory limitations set out in the Health Care Decisions Law. Principals do not intend to convey general decisionmaking authority upon their agents when they execute an advance directive; there are other legal mechanisms to grant such power. (See *infra*, Section B.2.) Instead, the principal's purpose is distinct: to preserve their personal autonomy and continue to direct their health care decisions, ensuring the care they receive, despite their capacity status, aligns with their own wishes, values, and interests.

An agent who exceeds an advance directive's specific grant of power goes against the principal's deliberate purpose in executing the document. Advance directives under the Health Care Decisions Law should not be read to convey any more decisionmaking authority than the principal intended. "Health care decision" should not be so broadly defined as to encompass decisions (whether affecting future legal rights or otherwise) that the principal never contemplated to authorize when executing the advance directive.

B. Legislative History from the Law Revision Commission Supports Logan's Argument that "Health Care Decisions" Do Not Include Arbitration

The California Law Revision Commission's ("Commission") final report regarding the Health Care Decisions Law cements the point that "health care decisions" within an advance directive are intended to facilitate treatment when the principal is

incapacitated—not to select a forum for legal claims that may be brought later on.

As this Court has noted, the Health Care Decisions Law "dr[ew] heavily from the Uniform Health Care Decisions Act adopted in 1993 by the National Conference of Commissioners on Uniform State Laws." (See *Wendland, supra*, 26 Cal.4th at p. 539; *2000 Health Care Decisions Law and Revised Power of Attorney Law* (March 2000) 30 Cal. Law Revision Com. Rep. (2000), available at http://www.clrc.ca.gov/pub/Printed-Reports/Pub208.pdf [hereafter "California Law Revision Commission Report"].) The California Law Revision Commission adapted the uniform act to create the current version of California's law. (*Wendland, supra*, 26 Cal.4th at p. 530.)

In *Wendland*, this Court relied on the Commission's comments to gain insight into the Health Care Decision Law's history, stating that "[e]xplanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." (*Id.* at p. 542, citing *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 623.) Mr. Logan cites the Commission's 1998 Annual Report with explanatory comments regarding the proposed legislation. (Answer Brief at 5, 6, 18.) Country Oaks does not cite the Commission's reports.

1. The Point of Authorizing "Health Care Decisions" Is to Facilitate Treatment When the Principal Lacks Capacity

Beyond the 1998–1999 Annual Report, the Commission's Final Report cited in *Wendland* suggests that, unless otherwise specified, "health care decisions" are intended to facilitate the principal's treatment while incapacitated. "The Act recognizes and validates an individual's authority to define the scope of an instruction or agency as broadly or as narrowly as the individual chooses." (California Law Revision Commission Report at p. 8.) Where a principal authorizes "health care decisions," the "law is limited: it governs health care decisions to be made for adults at a time when they are incapable of making decisions on their own and provides mechanisms for directing their health care in anticipation of a time when they may become incapacitated." (California Law Revision Commission Report at p. 6.)

The point of authorizing "health care decisions" while incapacitated is to ensure that treatment occurs consistently with the principal's known wishes or best interests. (Prob. Code § 4684; see Reply Brief on the Merits ("Reply") at 6.) The Commission adopted the health care power of attorney mechanism because existing law did "not provide a convenient mechanism for making health care *treatment wishes* known and effective, separate from the procedure for appointing an agent." (California Law Revision Commission Report at p. 6, emphasis added.) To protect a patient's "treatment wishes," the Commission defined "health care" as "any care, treatment,

service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition." (California Law Revision Commission Report at p. 52; see Prob. Code § 4615.)

The Commission's focus on "treatment" forecloses Country Oaks's argument that the "selection and discharge of health care providers and institutions" within the definition of a "health care decision" can be seen as encompassing arbitration. (Reply at 9, citing Prob. Code § 4617.) The report refers to "health care decisions" as "treatment decision[s]" at least five times. (California Law Revision Commission Report at p. 23, 31, 36, 41, 99.) Regarding Probate Code section 4617's definition of "health care decision," specifically, the Commission notes that, "[d]epending on the circumstances, a health care decision may range from a decision concerning one specific treatment through an extended course of treatment, as determined by applicable standards of medical practice." (California Law Revision Commission Report at p. 53, Comment re: § 4617.) This tracks provisions of the Health and Safety Code in existence when the Health Care Decisions Law was enacted that treated "decisions concerning . . . health care" as synonymous with "medical treatment decisions." (See Health & Saf. Code § 1418.8.)

Country Oaks does not cite the legislative history regarding "treatment" in either of its briefs, but instead attempts to construe arbitration as a "health care decision" through the faulty logic that "[a]n agent is an agent," so agency for health care necessarily entails agency for other purposes. (Reply at 14.) Few, if any, decisions are more significant than the health care

decisions an individual makes at the end of life. "[E]mpower[ing] another . . . to make life and death decisions" does not imply the authority to make "the far less significant decision to arbitrate with a health care provider." (Opening Brief on the Merits ("OBM") at 7.) By Country Oaks's logic, a health care agent would have the power to make almost any decision because most decisions are less consequential than life or death. California courts have already rejected this logic, finding that there is nothing "counterintuitive" in conferring authority to make significant medical decisions without including additional contracting rights. (*Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 302–303.)

By the same token, Country Oaks's argument that "health care decisions" include "all of the paperwork that admission to a healthcare facility entails" is unpersuasive now that the law forbids including an arbitration agreement among the "paperwork" that a facility can require to secure admission. (See OBM at 20; 42 C.F.R., § 483.70, subd. (n)(1).)

2. The Commission Defined "Health Care Decisions" Not to Include the Contracting Rights Available Under a Durable Power of Attorney

While the Commission's report refers to "health care decisions" to facilitate "treatment," it never construes legal disputes as "health care decisions." The final report only mentions "submit[ting] to arbitration" among the powers conferred by a general power of attorney. (California Law

Revision Commission Report at p. 204, 211, 216, 219 [referring to Prob. Code §§ 4450, 4456, 4459, and 4461].) Unlike health care powers, the Commission included arbitration among the powers of a general attorney because selecting a forum for disputes is a "[t]ypical responsibilit[y]" encompassed within that agent's powers. (California Law Revision Commission Report at p. 203.) In the Civil Code's parlance, the Commission believed that agreeing to arbitration is "usual" for an agent only under a general power of attorney. (Civ. Code § 2319.)

The law spells out such broad authority for general agents so that they can interact freely with third parties, who should be able to rely on the agent's authority without dispute. (California Law Revision Commission Report at p. 203.) Surely, the Legislature would have wanted health care agents and care facilities to avoid similar disputes had it intended health care decisions to encompass general contracting rights. When the Legislature intends an agent's powers to include the authority to "submit [the principal's claims] to arbitration," it has so stated plainly and directly. (See Probate Code §§ 4450, 4456, 4459, and 4461.) The Legislature's omission of such statutory language in the Health Care Decisions Law indicates that the authority of health care agents does not extend so far.

The Court's decision in *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706, provides a helpful illustration of how the broad powers possessed by general agents compare to the narrow powers of a health care agent. As Country Oaks acknowledges, *Madden* addressed powers held by the Board

of Administration of the State Employees Retirement System as a general agent tasked with negotiating insurance coverage for public employees. (OBM at 14–18; *Madden, supra*, 17 Cal.3d at p. 706.) *Madden* has no bearing on the authority of an agent whose authority is limited to "heath care decisions," and it has nothing to say about the Health Care Decisions Law enacted 43 years after *Madden* was decided.[1] (See *Madden, supra*, 17 Cal.3d at p. 706.)

[1] *Madden*'s focus on arbitration's benefits is also irrelevant because "a court may not devise novel rules to favor arbitration over litigation." (*Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, 1713; see also *Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 912.) In any event, there are strong reasons to doubt whether the benefits that *Madden* focused on would be realized here. The Centers for Medicare & Medicaid Services found that, unlike general hospital care for a consenting adult as in *Madden*, nursing home "residents are frequently admitted during a time of stress and often after a decline in their health." (84 Fed.Reg. 34718.) "[T]hese circumstances make it extremely difficult for LTC [Long-Term Care] residents or their representatives to make an informed decision about arbitration." (*Ibid*.) The Wall Street Journal reported that the cost to settle claims dropped as nursing homes began including arbitration clauses in their contracts—even as claims of mistreatment were rising. (Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, Wall Street Journal (Apr. 11, 2008).) Industry consultants report that the cost to a nursing home of settling a resident's claim drops by 20 to 40 percent when the contract has an arbitration clause. (Aon Risk Solutions, *2013 Long Term Care General Liability & Professional Liability Actuarial*; see also American Assoc. for J., The Truth About Forced Arbitration (2019), available at https://www.justice.org/resources/research/the-truth-about-forced-arbitration.)

Country Oaks's arbitration agreement itself supports the view that only those with a general power of attorney retain the right to agree to arbitration not necessary to facilitate medical treatment. The agreement certifies Mr. Harrod's authority to agree to arbitration "[b]y virtue of [Mr. Logan]'s consent, instruction and/or *durable power of attorney*." (AA 62, emphasis added.) The agreement never mentions Mr. Harrod's health care decisionmaking powers as the source of his authority to agree to arbitration. (AA 62; see Prob. Code §§ 4401, 4450, 4456, 4459, 4461.)

C. The Court Should Interpret a Health Care Agent's Powers Consistently with Limitations Imposed on Next-of-Kin

California courts have long interpreted next-of-kin "health care decisions" not to include the right to agree to arbitration, which should compel a similar interpretation for health care agents due to the "uniform standard of decisionmaking" for both types of decisionmakers. (See § A.1, *supra*.) The next-of-kin opinions turn on the fact that agreeing to arbitration is unnecessary to facilitate medical treatment. That logic should control over *Garrison* and *Hogan*, relied on by Country Oaks, which only deemed health care decisions to encompass arbitration on the assumption that agreeing to arbitration was necessary to secure admission into a treatment facility. (See *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 266; *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259.) As noted, that assumption is no longer warranted because

facilities may not make admission contingent on consenting to arbitration. (42 C.F.R., § 483.70, subd. (n)(1).) Mr. Logan cites the next-of-kin cases briefly (see Answer Brief at 16, fn. 4) whereas Country Oaks does not cite them at all.

In *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal. App. 4th. 581, 591, the court held that a husband lacked authority to bind his incapacitated wife to arbitration even though he had power as next of kin to make medical decisions on her behalf. By statute, the husband's kinship gave him certain powers similar to those held by Mr. Harrod—to "participate in the plan of care" and "to consent to or refuse medical treatment." (*Ibid.*) The court recognized the purpose of this authority to ensure that medical decisions can be made by a trusted surrogate when the patient is incapacitated:

> as a matter of practical necessity there are certain decisions that must be made for a mentally incompetent nursing home patient even when there is no formal representative. The Legislature recognized this reality when it specified next of kin as among the persons authorized to make medical decisions and enforce the Patient's Bill of Rights.

(*Id.* at p. 593.) The court found that it was unnecessary to agree to arbitration for the purpose of securing a patient's treatment in a health care facility. (*Ibid.*) "Unlike admission decisions and medical care decisions, 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." (*Id.* at p. 594.)

The court came to a similar conclusion in *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 376, finding that a mother had not given her daughter authority to agree to arbitration by treating the daughter as an agent for certain health care decisions. In that case, the mother instructed medical providers to communicate with her through her daughter. (*Id.* at p. 376.) The daughter scheduled the mother's medical appointments and ordered her prescription refills, signed a consent form for the mother's hip surgery, and helped develop and implement her care plan. (*Ibid.*) The court held that these "health care examples" of agency "do not equate with being an agent empowered to waive the constitutional right of trial by jury." (*Id.* at p. 377.) In other words, the mother's consent for the daughter to make "health care decisions for her" did not "'translate[] into authority to sign an arbitration agreement.'" (*Ibid.*, citing *Pagarigan, supra*, 99 Cal.App.4th at p. 302.)

Pagarigan stands as another example of a court deeming a family member's authority over health care decisions not to include the power to agree to arbitration. That case involved an arbitration agreement signed by the adult children of a comatose patient. (*Pagarigan, supra*, 99 Cal.App.4th at p. 300.) As next of kin, the children held the authority under Health & Safety Code section 1418.8 to make medical decisions because their mother "lack[ed] capacity to make a decision regarding . . . her health care." (See Health & Saf. Code § 1418.8.) Despite possessing health care decisionmaking powers, the court construed the children's authority narrowly not to include agreeing to

arbitration on the mother's behalf. (*Pagarigan, supra*, 99 Cal.App.4th at pp. 302–303.)

D. The Present Dispute Turns on State-Law Agency Principles That Operate Independently of the Federal Arbitration Act

The Federal Arbitration Act ("FAA") does not preempt California's generally applicable statutes limiting a health care agent's authority to make "health care decisions." (See *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 137 S.Ct. 1421.)

For purposes of the FAA, this case mirrors *Arredondo v. SNH SE Ashley River Tenant, LLC* (2021) 433 S.C. 69, cert. denied (2021) 142 S.Ct. 584, a case the United States Supreme Court had no interest in reviewing. *Arredondo* involved broad authority granted to a principal's daughter through both a General Durable Power of Attorney ("GDPOA") and a Health Care Power of Attorney ("HCPOA"). (*Id.* at p. 73.) The GDPOA gave the daughter authority, exceeding Mr. Harrod's rights here, to execute written instruments concerning her father's property rights. (*Id.* at p. 79.) The HCPOA expressly authorized the daughter to execute "waivers" necessary to implement health care decisions. (*Id.* at p. 81.) The South Carolina Supreme Court found that these POAs, by their terms, did not grant the daughter authority to execute the arbitration agreement on her father's behalf, and the United States Supreme Court declined review. (*Id.* at p. 85; *SNH SE Ashley River Tenant, LLC v. Arredondo* (2021) 142 S.Ct. 584 [denying certiorari].)

Country Oaks glosses over *Arredondo*, incorrectly suggesting that this case found a power of attorney must "clearly and expressly 'grant the agent authority to execute a pre-dispute arbitration agreement,'" even though that rationale would violate *Kindred*. (Reply at 22.) In fact, *Arredondo* "emphasize[d]" at the outset that its "analysis does not turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the powers of attorneys" at issue. (*Arredondo, supra*, 433 S.C. at p. 75.) *Arredondo* repeatedly cited *Kindred* to support enforcement of neutral contracting principles even if they result in denial of arbitration. (*Id.* at p. 78.)

Indeed, *Kindred* respects neutral state-law rules that limit an agent's contracting authority. (*Kindred, supra*, 137 S. Ct. at p. 1429.) That case only found Kentucky's "clear statement" rule to violate the FAA because it singled out arbitration for disfavored treatment—requiring a principal to specifically authorize an agent to agree to arbitration while not requiring specific authorization for other agency rights. (*Id.* at pp. 1426–1427.) While the U.S. Supreme Court struck down the "clear statement" rule, it also upheld Kentucky's neutral agency principles and remanded so that the Kentucky Supreme Court could determine whether one of the POAs at issue was "insufficiently broad" to allow arbitration. (*Ibid.*)

Significantly, the Kentucky Supreme Court on remand found that the POA did not give the agent authority to agree to arbitration based on neutral state-law principles, and the U.S. Supreme Court denied review when the case went up a second

time. (*Kindred Nursing Centers Limited Partnership v. Wellner* (Ky. 2017) 533 S.W.3d 189, 194; *Kindred Nursing Ctrs. Ltd. P'ship v. Wellner* (2018) 139 S. Ct. 319.)

Applied here, it's possible to imagine many non-arbitration contracts that Mr. Harrod lacked the power to agree to on Mr. Logan's behalf based on neutral state-law principles. For example, the health care POA did not give Mr. Harrod the right to dispose of Mr. Logan's property, to open a bank account in his name, or to bind him to other legal or financial transactions. Country Oaks cannot explain how generally applicable agency rules limiting Mr. Harrod's authority to enter a broad range of non-arbitration contracts actually single out arbitration for discriminatory treatment. The limitation on the scope of Mr. Harrod's powers does not take its meaning from the fact that an arbitration agreement is at issue. If anything, Country Oaks's rule would single out arbitration for special treatment, a view the United States Supreme Court has rejected as unsupported by the FAA. (*Morgan, supra*, 142 S.Ct. at p. 1713.)

As noted, California courts have found several times under neutral state-law principles that the authority to make medical decisions does not encompass agreeing to arbitration. (*Pagarigan, supra*, 99 Cal.App.4th at p. 302; *Goliger, supra*, 123 Cal.App 4th at p. 377; *Flores, supra*, 148 Cal.App.4th at pp. 593–594.) In any context, an agent cannot bind a principal to a contract which he lacks authority to execute. As one court put it: "The FAA is simply not relevant when there is no contract in the first place, which is the case here. [The agent] did not have the authority to

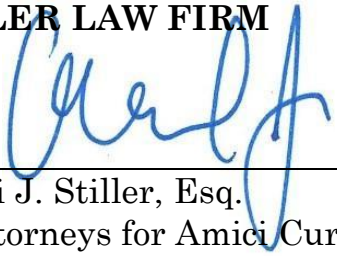
bind [the principal], and therefore, there was no existing arbitration agreement to be governed by the FAA." (*Holley v. Silverado Senior Living Management, Inc.* (2020) 53 Cal.App.5th 197, 205.)

CONCLUSION

The Court should affirm the Court of Appeal's decision and find that Mr. Logan giving Mr. Harrod the authority to make "health care decisions" did not allow him to choose the forum for Mr. Logan's legal claims.

June 5, 2023

STILLER LAW FIRM

By: 

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California, Compassion &
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.520(c), the attached brief contains 4,696 words, not including the tables of contents and authorities, the caption page, signature blocks, the verification, or this certification page, as counted by the word processing program used to generate it.

June 5, 2023

STILLER LAW FIRM

By: _____

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is 16133 Ventura Blvd., Suite 1200, Encino, CA 91436.

On **June 5, 2023**, I served true copies of the following document(s) described as: **APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA, COMPASSION & CHOICES, AMERICAN ASSOCIATION FOR JUSTICE, AND PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF AND RESPONDENT** on interested parties in this action to:

SERVICE LIST ON FOLLOWING PAGE

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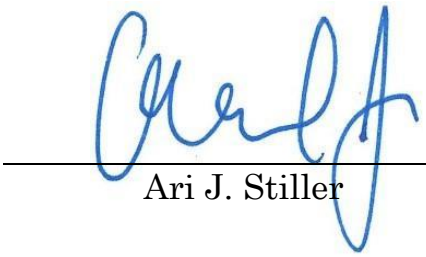
I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **June 5, 2023**, at Los Angeles, California.



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