No. 23-

IN THE

Supreme Court of the United States

COUNTRY OAKS PARTNERS, LLC DBA COUNTRY OAKS CARE CENTER AND SUN MAR MANAGEMENT SERVICES, INC.,

Petitioners,

v.

MARK HARROD

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Arbitration Act (FAA) requires State Legislatures and the courts to place arbitration agreements "on equal footing with all other contracts." *Kindred Nursing Centers Ltd. v. Clark*, 581 U.S. 246, 248 (2017) (*Kindred*); *see* 9 U.S.C. § 2. *Kindred* held that an agent acting under a power of attorney was empowered to agree to arbitrate disputes with a nursing home arising out of the care provided to the principal. Kentucky's "clear-statement rule," which required the nursing home patient to explicitly grant the agent authority to so agree, violated the FAA by singling out arbitration for disfavored treatment. *Id*. at 248, 251-52.

In its decision below, the California Supreme Court likewise declined to enforce an arbitration agreement signed by an agent appointed by his uncle under an advance directive to make "health care decisions," which included the incapacitated patient's admission to a nursing care facility. California's highest court reasoned that because the Legislature expressly *prohibited* any agreements to arbitrate from being included within the nursing home's standard admission contract, a "standalone" arbitration agreement regarding the medical provider's services signed by the power of attorney at the same time was invalid absent a clear statement of his or her authority.

This interpretation gives rise to the following issues:

1. Whether the FAA preempts state law contract statutes and regulations by singling out for disfavored treatment arbitration agreements entered into between California health care

providers and an agent who is appointed under a power of attorney to make "health care decisions" (advance directive) and enter into contracts for those services on behalf of the principal.

2. Whether the California Supreme Court's interpretation of state law contract statutes and regulations for services offered by health care providers imposes a "clear-statement rule" that unduly impairs the agent's authority to agree to arbitrate disputes while acting under such an advance directive in conflict with the FAA and this Court's precedent.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Country Oaks Partners, LLC is owned by David Johnson, Thomas Chambers, Eli Marmur, and Frank Johnson, each of whom possess an ownership interest of 10 percent or more.

Petitioner Sun Mar Management is owned by Eli Marmur and Frank Johnson, each of whom possess an ownership interest of 10 percent or more.

The above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the part if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves.

Petitioners' counsel certifies that they are not currently aware of any other entities or persons required to be listed under Rule 29.6.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the California Court of Appeal and California Supreme Court; they were defendants and moving parties in the trial court (Los Angeles County Superior Court) below.

The original plaintiff in the trial court, Charles Logan, was the patient admitted to Country Oaks and principal under the advanced directive executed in favor of his agent and nephew Mark Harrod (Harrod). Logan was the respondent in proceedings before the California Court of Appeal and California Supreme Court.

Logan was originally the named plaintiff in the trial court. Harrod was also a party acting in the capacity of his uncle's appointed guardian ad litem. Logan's action named as defendants Country Oaks and Sun Mar and an individual defendant Alessandra Hovey (the administrator of Country Oaks). Logan later dismissed Hovey.

Harrod substituted as real-party plaintiff and respondent on appeal in the capacity as his late uncle's personal representative after Logan died while the case was pending before the California Supreme Court. The case caption was retitled: *Harrod v. Country Oaks Partners, LLC,* et al., Cal. S. Ct. No. S276545 (Dkt. Dec. 21, 2023; App. A at 7a, n.5.).

RELATED PROCEEDINGS

California Supreme Court (No. S276545):

The judgment of the Supreme Court of California appears in a published decision issued on March 28, 2024 and is reported as: *Harrod v. Country Oaks Partners, LLC*, 15 Cal.5th 939 (2024) (hereafter *Harrod*). (App. at 1a.)

California Court of Appeal, Second Appellate District, Division (No. B312967)

Harrod affirmed an opinion of the California Court of Appeal, which agreed with the trial court's denial of petitioners' motion to compel arbitration. The Court of Appeal held that a "health care decision" does not encompass separate arbitration agreements presented alongside a mandatory facility admissions agreement signed by the agent while acting under the patient's power of attorney to make health care decisions. The Court of Appeal's published decision was issued on August 18, 2022, and is reported as: *Logan v. Country Oaks Partners, LLC*, 82 Cal.App.5th 365 (2022) (*Logan*). (App. at 40a.)

Los Angeles County Superior Court (No. 20STCV26536):

The trial court in *Logan v. Country Oaks Partners, LLC*, by its order entered on March 4, 2021, denied defendants Country Oaks' and Sun Mar's motion to compel arbitration of Logan's claims in suit. (App. at 54a.)

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PETITION FOR A WRIT OF CERTIORARI

Country Oaks Partners, LLC and Sun Mar Management Services, Inc. (collectively Petitioners) respectfully petition for a writ of certiorari to review the published decision and judgment of the Supreme Court of California issued on March 28, 2024, denying their motion to compel arbitration.

OPINIONS BELOW

The California Supreme Court's decision issued on March 28, 2024: *Harrod v. Country Oaks Partners, LLC*, 15 Cal.5th 939 (2024) (hereafter *Harrod*). (App. at 1a-39a.)

The Court of Appeal's published decision issued on August 18, 2022: *Logan v. Country Oaks Partners, LLC*, 82 Cal.App.5th 365 (2022) (*Logan*). (App. at 40a-53a.)

The Superior Court of Los Angeles County's order issued on March 4, 2021, denying the motion to compel arbitration of Logan's claims. (App. at 54a-68a.)

JURISDICTION

The California Supreme Court issued its decision on March 28, 2024; its judgment is now final as to that court. This Petition has been timely filed within 90 days thereafter, pursuant to Supreme Court Rule 13.

This Court's jurisdiction rests on 28 U.S.C. § 1257(a). *See Madruga v. Super. Ct.*, 346 U.S. 556, 557, n.1 (1954) (California Supreme Court's disposition is a final judgment under 28 U.S.C. § 1257). Accordingly, this Court has

appellate jurisdiction to review a final judgment rendered by the highest court of a state that draws into question the validity of a statute or judicial decision "on the ground of its being repugnant to the Constitution, treaties or laws of the United States …." *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 474, n.4 (1989) (FAA preemption); *Kindred*, 518 U.S. at 248, 251-56 (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

California Health and Safety Code (hereafter Health & Safety Code) section 1599.61, subdivision (a) provides:

> (a) By January 1, 2000, all skilled nursing facilities, as defined in subdivision (c) of Section 1250, intermediate care facilities, as defined in subdivision (d) of Section 1250, and nursing facilities, as defined in subdivision (k) of Section 1250, shall use a standard admission agreement developed and adopted by the department. This standard agreement shall comply with all applicable state and federal laws.

Health & Safety Code section 1599.81 provides:

> (a) All contracts of admission that contain an arbitration clause shall clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility.
>
> (b) All arbitration clauses shall be included on a form separate from the rest of the admission contract. This attachment shall contain space for the signature of any applicant who agrees to arbitration of disputes.
>
> (c) On the attachments, clauses referring to arbitration of medical malpractice claims, as provided for under Section 1295 of the Code of Civil Procedure, shall be clearly separated from other arbitration clauses, and separate signatures shall be required for each clause.

> (d) In the event the contract contains an arbitration clause, the contract attachment pertaining to arbitration shall contain notice that under Section 1430, the patient may not waive his or her ability to sue for violation of the Patients Bill of Rights.

California Probate Code (hereafter Probate Code) section 4605 provides:

> "Advance health care directive" or "advance directive" means either an individual health care instruction or a power of attorney for health care.

Under Probate Code section 4607:

> (a) "Agent" means an individual designated in a power of attorney for health care to make a health care decision for the principal, regardless of whether the person is known as an agent or attorney-in-fact, or by some other term.

Probate Code section 4683 states in part:

> Subject to any limitations in the power of attorney for health care:
>
> (a) An agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so.

> Probate Code section 4684 states in part:
>
> 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 …
>
> Probate Code section 4688 states:
>
> Where this division does not provide a rule governing agents under powers of attorney, the law of agency applies.

STATEMENT OF THE CASE

1. Factual Background

The original plaintiff in the underlying personal injury action, Charles Logan (Logan), now deceased, executed an advance health care directive, "Including Power of Attorney for Health Care Decisions" ("Directive"), that appointed his nephew, Mark Harrod, as his agent to make health care decisions for him. (App. 58a.) The Directive is a form provided with the California Medical Association's "Advance Health Care Directive Kit." (*See* App. 3a.)

The Directive provides that Harrod's authority triggers when Logan's primary care physician determines he can no longer make his own health care decisions.[1] The document states in relevant part:

---

1. This is also referred to as a "springing" health care directive. Harrod's authority to act as appointed agent takes effect upon incapacity. (*See, e.g.*, App. 5a.)

> If my primary physician finds that I cannot make my own health care decisions, I grant my agent full power and authority to make those decisions for me, subject to any health care instructions set forth below. My agent will have the right to:
>
> A. Consent, refuse consent, or withdraw consent to any medical care or services, such as tests, drugs, surgery, or consultations for any physical or mental condition. This includes the provision, withholding or withdrawal of artificial nutrition and hydration (feeding by tube or vein) and all other forms of health care, including cardiopulmonary resuscitation (CPR).
>
> B. Choose or reject my physician, other health care professionals or health care facilities.
>
> C. Receive and consent to the release of medical information.
>
> D. Donate organs or tissues, authorize an autopsy and dispose of my body, unless I have said something different in a contract with a funeral home, in my will, or by some other written method.

(App. 42a.)

The Directive also stated that "your agent must make health care decisions believe[d] to be in your best interest, considering your personal values to the extent they are

known." (*See* App. 58a.) The Directive was signed by Logan and notarized in July 2017. (*Id.*)

Two years later, when he was approaching 77, Logan was admitted to Country Oaks Care Center ("Country Oaks"), a skilled nursing facility, to assist in recovery from a right femur fracture he suffered in a fall. (App. 4a.)

When admitted to the Country Oaks nursing facility, Logan identified Harrod as his power of attorney for health care, emergency contact, and next of kin. Logan granted signatory authority to Harrod for various documents, as follows:

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

(*See* App. 5a.)

Upon admission to a skilled nursing facility, the patient or his representative must sign a standard admission agreement. (Health & Saf. Code, § 1599.61, subd. (a).) Harrod signed the facility's admission agreement as Logan's "Legal Representative/Agent" on November 29, 2019. (App. 42a.) He was assisted by Country Oaks' admissions coordinator. (App. 60a.)

If a skilled nursing facility requests that the patient agree to arbitration, under California's Health Care Decisions Law this arbitration provision cannot be included in the standard admission agreement, but must be set forth in a separate document with a separate signature line. (Health & Saf. Code § 1599.81, subd. (b); 22 Cal. Code Regs. § 72516, subd. (d).) Consistent with this statutory mandate, Harrod executed a separate arbitration agreement with Country Oaks on behalf of Logan. (App. 4a, 42a.) He signed the document on the same day he executed the admission agreement. (*Id.*)

The arbitration agreement provides that any dispute or claim that relates to or arises out of the provision of (or failure to provide) services or health care, including violations of the Elder Abuse and Dependent Adult Civil Protection Act, will be determined by submission to binding arbitration: "Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration." (*See* App. 5a-6a.)

Directly above Harrod's signature, the agreement states: "By virtue of Resident's consent, instruction and/or durable power of attorney, I hereby certify that I am

authorized to act as Resident's agent in executing and delivering of this arbitration agreement." (App. 45a, 61a.) Directly below Harrod's signature line, the agreement identifies him as his uncle's "legal representative/agent[.]" (App. 41a, 42a, 61a.)

Logan remained at Country Oaks until December 2019. He suffered a fall and his family were unsatisfied with his care. He was discharged to another skilled nursing facility due to his family's dissatisfaction with Country Oaks. (App. 43a.)

2. Procedural History

In July 2020, Logan filed suit against Country Oaks, Sun Mar and Alessandra Hovey (the administrator of Country Oaks whom Logan later dismissed), asserting causes of action for declaratory relief, elder abuse and neglect, negligence, and violation of the Resident's Bill of Rights. Harrod was appointed as Logan's guardian ad litem. (App. 56a.)

Country Oaks moved to compel arbitration based on the arbitration agreement executed by Harrod. After opposition and reply papers were filed, the trial court asked for supplemental briefing on the issue of whether a health care agent may bind his principal to arbitration. (App. 43a.) The trial court then denied Country Oaks' motion in March 2021. (App. 55a.) The court held that the Directive only authorized Harrod to make "health care decisions," which do not encompass arbitration agreements with a health care provider. (App. 61a-62a.) The court also found that execution of the agreement was not part of the "medical decision-making process"

because it was executed 19 days after Logan was admitted to the facility and the agreement was not a condition of admission. (App. 63a.) According to the trial court, the authority of the Directive "only extended to the documents necessary to admit Logan …." (App. 65a.)

The California Court of Appeal affirmed in a published opinion. (*Logan v. Country Oaks Partners, LLC*, 82 Cal.App.5th 365 (2022) (*Logan*).) The Court of Appeal concluded the agent's "health care decisions" did not encompass the authority to sign a separate arbitration agreement entered into with the selected health care providers. (App. 50a-52a.)

The California Supreme Court affirmed in its decision issued on March 28, 2024. (App. 1a.)

REASONS WHY THE PETITION SHOULD BE GRANTED

As in *Kindred*, at issue here 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. *Kindred*, 581 U.S. at 248, 255-56.

California has long recognized 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,* 17 Cal.3d 669, 709 (1976) (*Madden*).) The California courts followed *Madden*'s view that a durable power of attorney and advance medical directive providing for the agent to

make "health care decisions" encompasses the authority to execute an arbitration agreement on behalf of the patient with the medical providers who are selected to provide those services. *Garrison v. Superior Court*, 132 Cal.App.4th 253, 264, 267 (2005) (*Garrison*), disapproved in *Harrod*, 15 Cal.5th 939 (2024); *Hogan v. Country Villa Health Services*, 148 Cal.App.4th 259 (2007) (*Hogan*) (interpreting the same Health Care Decisions Law and holding that the Advance Directive to make health care decisions authorized the agent to execute arbitration agreements within the scope of that agency), disapproved in *Harrod, supra*, 15 Cal.5th 939. *Hogan*, *Garrison* and similar cases are now "disapproved" by *Harrod*. (App. at 22a, n.7; *id.* at 30a, n.17.)

Before *Harrod*, California did not impose a rule requiring a "clear-statement" that specifically enumerated the agent's authority under a patient's advance directive to choose to arbitrate disputes when entering into "health care" contracts with a provider. By this new interpretation, the "[California] Supreme Court specially impeded the ability of attorneys-in-fact to enter into arbitration agreements. The court thus flouted the FAA's command to place those agreements on an equal footing with all other contracts." *Cf. Kindred*, 581 U.S. at 255-56.

The California Supreme Court's *Harrod* decision conflicts with the FAA and this Court's precedents, including *Kindred*. Review of that decision is therefore important to assure the enforceability of arbitration contracts entered into by a patient's duly appointed agent relating to the performance of essential health care services in California and other states.

ARGUMENT

1. California's Clear-Statement Rule Conflicts with the FAA and Precedents of This Court.

The Supremacy Clause provides that the Constitution and laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The Supremacy Clause "provides 'a rule of decision' for determining whether federal or state law applies in a particular situation." *Kansas v. Garcia*, ___ U.S. __, 140 S. Ct. 791, 801 (2020), *quoting Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015).

A federal statute may expressly preempt state law by enacting a clear statement to that effect. *Id.* In the absence of an express provision for preemption, this Court has instructed "that state law must yield to a congressional Act in at least two circumstances." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

First, "'[w]hen the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively,' state law is preempted." *Chamber of Commerce of the United States v. Bonta*, 62 F.4th 473, 481-82 (9th Cir. 2023) (*Bonta*) (internal citations omitted).

Second, "[e]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. at 372. Conflict preemption may occur either where it is "impossible for a private party to comply with both state

and federal requirements," *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 303 (2019), or where, under the circumstances of a particular case, the challenged state law "*creates an unacceptable 'obstacle* to the accomplishment and execution of the full purposes and objectives of Congress[.]'" *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009) (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Bonta*, 62 F.4th at 482-83.

"The FAA ... does [not] reflect a congressional intent to occupy the entire field of arbitration." *Bonta*, 62 F.4th at 482, *quoting Volt*, 489 U.S. at 477. But "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Id.*, *quoting Crosby*, 530 U.S. at 372.

In considering the preemptive scope of the FAA, this Court's jurisprudence has focused on "obstacles" involving enacted state laws or "judge-made rules" that "single out executed arbitration agreements and prevent the enforcement of such agreements according to their terms." *Bonta*, 62 F.4th at 483; *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 49 (2015) (*Imburgia*); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (*Concepcion*).

"[T]he FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements, but also extends to *state rules that discriminate against the formation of arbitration agreements*." *Bonta*, 62 F.4th at 483, 486, italics added.

The test for *obstacle preemption* thus extends to any "state rule [that] interferes with arbitration if it discriminates against arbitration on its face or if it

'covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements.'" *Bonta*, 62 F.4th at 483, *citing Kindred*, 581 U.S. at 251. State rules that disfavor the "defining features" of arbitration include a rule that prohibits an agreement that waives the right to a class action, or one that waives the right to a jury trial, or any other of the myriad "devices and formulas" used to declare arbitration against public policy. *Id.* at 251-52*; see also Concepcion*, 563 U.S. at 342.

Kindred is just one case among many recent examples of state laws and judicial rules that this Court has determined are preempted by the FAA. The catalogue of rules that have frustrated private parties from entering into arbitration agreements with skilled nursing facilities and other health care providers, include these cases:

Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533-34 (2012) (*Marmet*), held: "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *See Kindred*, 581 U.S. at 256 (denial of arbitration as a result of any "erroneous, arbitration-specific rule" is preempted in light of *Marmet*).

In *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (*Casarotto*), this Court likewise concluded that the FAA preempted a Montana law making an arbitration agreement regarding medical negligence claims against physicians unenforceable unless the contract had the proper notice on the first page. 517 U.S. at 683. *Casarotto*

held that "[t]he 'goals and policies' of the FAA … are antithetical to threshold limitations placed specifically and solely on arbitration provisions" with health care providers. *Id.* at 688, internal citation omitted.

And dispositive of the circumstances presented in this case, *Kindred* held that the FAA preempted the "Kentucky Supreme Court's clear-statement rule," which provided that a person holding a power of attorney for a family member could not enter into an arbitration agreement for that family member, unless the power of attorney gave the family member express authority to do so. *Kindred*, 581 U.S. at 248-52. In stark contrast to *Harrod*'s analysis, *Kindred* reasoned that the Kentucky rule "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements … [and] thus flouted the FAA's command to place those agreements on an equal footing with all other contracts." *Id.* at 251-52.

Marmet, Casarotto and *Kindred* make it clear that state rules burdening the formation of arbitration agreements with health care providers impermissibly stand as an obstacle to the FAA. As *Kindred* explains, the "FAA cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them." *Kindred*, 518 U.S. at 254-55 (alterations in original). This Court has recognized that it would be "trivially easy for States to undermine the Act—indeed, to wholly defeat it"—by fashioning a rule that would make the formation of any arbitration agreement invalid. *Id.* at 255. "The FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration." *Id.*; *see Bonta*, 62 F.4th at 482-86 (*citing* numerous other examples).

Harrod reaches the opposite conclusion by ostensibly recasting the statutory meaning of "health care decisions" entrusted to the patient's agent under the Health Care Decisions Law (or HCDL) and related regulations that govern the form of mandatory admission agreements for California skilled nursing facilities.

According to *Harrod*, and the Court of Appeal's decision it affirmed, the 1999 enactment of the HCDL and related provisions of California's Health and Safety Code "decoupled" arbitration agreements from the standard form nursing home admission agreement mandated by state law. Probate Code, §§ 4600, et seq.; Health & Safety Code, § 1599.18, subds. (a) and (b). (*See Harrod*, App. at 13a; *see also Logan*, App. at 50a: "the 'health care decision' (whether to consent to admission into the skilled nursing facility) has been *expressly decoupled* from the decision whether to enter into the optional arbitration agreement." (Italics added.).)

Harrod reasoned that by virtue of the 25-year-old provisions of the HCDL, the Legislature implicitly declared that an agent acting under an advance directive, such as Logan's nephew Mr. Harrod, was *not authorized* to agree to arbitrate disputes with the facility selected to provide care for his principal:

> [D]efining the term "health care decision" to include a standalone arbitration agreement would not be "in concert with" … the items listed [in the HCDL] and, therefore, with the apparent intent evidenced by the definitional provisions of Logan's power of attorney or the Health Care Decisions Law it invokes.

(App. at 13a, internal citations omitted.)

This supposed "discovery" of the HCDL's provisions and the concept of decoupling was nothing new. The same issues had been raised, and disposed of, several times by the California courts in the decades following the enactment of the HCDL. *Hogan*, 148 Cal.App.4th 259, and *Garrison*, 132 Cal.App.4th 253, addressed essentially identical arguments more than a dozen years ago:

> "Under the combined effect of these three provisions of the [HCDL], [the daughter] had the authority to enter into the two arbitration agreements on behalf of [her mother]. [The daughter] executed the arbitration agreements while making health care decisions on behalf of [her mother]. Whether to admit an aging parent to a particular care facility is a health care decision. The revocable arbitration agreements were executed as part of the health care decisionmaking process.... [The daughter] was granted the authority to choose a health care facility which: does not require arbitration; makes arbitration optional as to some possible disputes, as here, and includes a 30-day time period to cancel the agreements to arbitrate; or absolutely requires the use of arbitration to resolve disputes over care. In this case, [the daughter] was authorized to act as [her mother's] agent in making the decision to utilize a health care facility which included an optional revocable arbitration agreement ...."

Hogan, 148 Cal.App.4th at 266 (first bracketed text added, other alterations in original text).

Responding to the patient's "decoupling" argument, whether the agreement to arbitrate appears within the nursing home's admission agreement or as an "optional" "standalone" contract, these cases concluded:

> "[W]hen 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 …, he or she may well be asked to decide whether to sign an arbitration agreement as part of the admissions contracts package. [Under either scenario,] the execution of the arbitration agreements [w]as 'part of the health care decisionmaking process.'"

Hogan, 148 Cal.App.4th at 268, *quoting Garrison, supra*, 132 Cal.App.4th at 266 (bracketed text added).

Inferring the agent's authority to agree to arbitrate in the context of signing health care contracts under an advance directive is deeply rooted in prior California precedent. Like the FAA, '"California law favors enforcement of arbitration agreements.'" *Garrison, supra*, 132 Cal.App.4th at 263. However, "'the right to compel arbitration [nonetheless] depends upon the existence of a valid agreement to arbitrate between the parties.'" *Id., quoting County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, 47 Cal.App.4th 237, 245 (1996) (*Contra Costa*) (alterations in original text).

Arbitration agreements are enforced with regularity in this State against non-signatories, depending upon a familial relationship, or as here, under an agency agreement that confers specific authority to make

decisions about "health care" owing the principal's legal or physical incapacity. To illustrate, in *Madden*, 17 Cal.3d at 702-09, the California Supreme Court *inferred* that a union representative was authorized to agree to arbitrate disputes under an agreement entered into with a health plan on behalf of state employees pursuant to statutory collective bargaining arrangements.

Doyle v. Giuliucci, 62 Cal.2d 606, 610 (1965), held that a father's pre-dispute agreement to arbitrate medical malpractice claims was binding on his minor child. This is among the many additional examples of the agent's inferred authority to arbitrate arising out of such health care decisions. *See Madden*, 17 Cal.3d at 709-10, *citing Doyle* with approval; *see also Ruiz v. Podolsky*, 50 Cal.4th 838, 850-53 (2010) (spouses and other heirs are bound by pre-dispute agreements to arbitrate medical negligence and wrongful death claims signed by the decedent); *Contra Costa*, 47 Cal.App.4th at 242-43 (digesting numerous other "health care" arbitration cases involving non-signatories).

As the California Supreme Court has previously affirmed, perceived "public policy" limitations, such as avoiding waiver of the "fundamental" and "constitutional" right to jury trial, will have no bearing on the agent's authority to agree to arbitrate disputes in the course of making health care decisions. *See Ruiz v. Podolsky*, 50 Cal.4th at 853, *citing Madden,* 17 Cal.3d at 713, n.12. The agent's "power to consent to arbitration instead of a jury trial … [arises by virtue of] the agency/principal relationship ma[king] the delegation reasonable" and also promotes the equally valid public policy favoring arbitration. *Ruiz v. Podolsky*, 50 Cal.4th at 853-54; *accord*, *Hogan,* 148 Cal.App.4th at 267-68; *Kindred*, 581 U.S. at 251-52.

Harrod suggests that *Madden* is "distinguishable" because of the *implicit* catchall authorization found in the California Government Code that allowed the union to negotiate health care contracts on behalf of public employees. *Harrod* viewed this as within the "proper and usual" scope of the agent's implied authority. (App. 29a-30a.)

On the other hand, *Harrod* reasoned that another catchall provision of California's 1994 version of the Uniform Powers of Attorney Law (Prob. Code § 4000, et seq.), adopting forms for general durable powers of attorney, authorizes an agent to make decisions about "personal and family maintenance" and to enter into arbitration contracts regarding those personal needs. *See* Prob. Code § 4459-4460. But the Powers of Attorney Law explicitly excluded "health care decisions." Prob. Code § 4401. The HCDL enacted in 1999, confirmed that exclusion. *Id.*, § 4450, subd. (a)(2),(1). According to *Harrod*, this evidenced the Legislature's intent that an agent appointed under an advance directive *may not* agree to arbitrate disputes relating to "health care decisions." (App. at 19a-20a.)

The logic does not follow. But even if it did, singling out "health care decisions" for disfavored treatment in this manner violates the FAA.

Before *Harrod* was decided, *Hutcheson v. Eskaton Fountain Wood Lodge*, 7 Cal.App.5th 937 (2017) (*Hutcheson*), disapproved in *Harrod,* 15 Cal.5th 939, and other cases, aptly resolved this supposed conundrum. In *Hutcheson,* the patient had signed both types of "powers of attorney" prior to her admission to a nursing home: A

health care power of attorney (Prob. Code § 4671, subd. (a)) appointed her niece to make "*health care decisions*" for her. Later, the patient signed another "statutory form" general durable power of attorney as set forth in the Uniform Power of Attorney Law (Prob. Code § 4000 et seq.), which authorized her sister to act for her regarding "personal care" matters, but explicitly *excluding* health care decisions.

Hutcheson held that *only the niece* who received her appointment under the "health care" power (advance directive), but not the sister, was authorized to sign the agreement admitting the patient to a skilled nursing facility, *and* the separate agreement to arbitrate. *Hutcheson*, 7 Cal.App.5th at 945-46; *accord*, *Gordon v. Atria Mgmt. Co., LLC*, 70 Cal.App.5th 1020, 1028-1030 (2000) (patient's son *was authorized* by the statutory "health care" power of attorney to admit her to the nursing home and to sign the separate agreement to arbitrate – *citing Hutcheson*, *Garrison* and *Hogan*).

Harrod disapproves of *Hutcheson*'s analysis as "dicta," although the specific reasons for doing so are not entirely clear. (App. at 13a, n.7.)

Other justifications offered to avoid the enforceability of the "optional, standalone" arbitration agreement signed by Harrod on behalf of his uncle in this case are also meritless. The Court of Appeal in *Logan* held that avoiding arbitration agreements was appropriate because of federal regulations "prohibiting" long-term care facilities participating in Medicare or Medicaid programs from requiring a resident (or his representative) to sign an arbitration agreement as a condition of admission. *See Logan*, App. 49a, *citing* 42 C.F.R. § 483.70(n)(1) (2019).

Even the Supreme Court's affirmance in *Harrod* rejects this argument: "*Hogan* … is correct that Health and Safety Code section 1599.81, which prohibits arbitration agreements from being a precondition to facility admission, plainly contemplates that patients and long-term health care facilities will enter into arbitration agreements. (*Cf.* 42 C.F.R. § 483.70(n) (2023) [imposing a similar rule on facilities participating in Medicare and Medicaid].)" (App. 33a.)

Whether the "optional, standalone" arbitration agreement was presented by the nursing home to the patient himself (Mr. Logan) or to his appointed agent (Mr. Harrod), these protections to avoid involuntary and unconscionable agreements are applied in the same even-handed manner. Logan's attorney-in-fact was offered a separate "optional" agreement to arbitrate disputes containing "a 30-day rescission right." *See Hogan*, 148 Cal.App.4th at 263. That separate agreement prominently stated at the top that arbitration *was not* a "condition" of admission to Country Oaks, and if signed, each of the parties waived their constitutional right to a jury trial. (App. 5a-6a.)

Harrod adopted the sophistic argument that the agent's power to sign an admission agreement with a nursing home is an authorized "health care decision," whereas the agreement to arbitrate is an unauthorized "legal decision" that merely concerns resolution of disputes. (*Harrod*, App. 38a; *Logan*, App. 47a.)

The weight of reasoned authority, consistent with the FAA, rejects that notion as untenable. Both the admission of the patient to a nursing home and the contemporaneous

agreement to arbitrate are *legal* decisions made on behalf of the principal *in the context* of his or her care: "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." *Owens v. Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 879 (Tenn. 2007) (*Owens*).

The context of the arbitration agreement in this case, as in *Hogan* and *Garrison*, is the incapacitated patient's care and 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 [Arbitration] Agreement was executed in the context of Decedent's admission to [the nursing home]." *Williams v. Smyrna Residential, LLC,* 2022 WL 1052429 at 6 (Tenn. Ct. App. 2022) [nonpub. opn.], *citing Owens*; *accord*, *Hogan,* 148 Cal.App.4th at 267-68; *Maide, LLC v. Dileo*, 504 P.3d 1126, 1130-31 (Nev. 2022) (explaining why the FAA preempted Nevada state law requiring that any arbitration agreement in a nursing home contract must contain the separate "specific authorization" of the patient or resident – *citing* cases from other jurisdictions).

Review of *Harrod* is necessary to resolve the conflict.

2. Resolving the Issues Raised by *Harrod*'s Interpretation is Important to Assure the Certainty of Arbitration Agreements Concerning Health Care Services Provided in California and Other States.

Harrod's insistence on a clear statement of the agent's power to agree to arbitrate in the context of nursing home

admissions cannot be reconciled with *Kindred* and the FAA. *Cf. Kindred*, 581 U.S. at 248, 251-52, 255-56.

The same statute principally relied upon by *Harrod* requiring a "standalone" agreement to arbitrate, separate from the mandatory nursing home admission form (Health & Safety Code § 1599.81), has been the subject of successful preemption challenges under the FAA. Subdivision (d) of section 1599.81 prohibits agreements to arbitrate claims under the Patients Bill of Rights. In 2014, the federal courts permanently enjoined the State of California from enforcing that provision in violation of the FAA. *Valley View Health Care, Inc. v. Chapman*, 992 F.Supp.2d 1016, 1039-1041 (E.D. Cal. 2014) (*Valley View*).[2]

More recent enactments by the California Legislature exhibit increasing hostility toward the formation and enforcement of agreements to arbitrate. For example, the Ninth Circuit Court of Appeals in *Bonta* was required to resolve FAA challenges to AB 51, a bill that discouraged (and penalized) employers from refusing to negotiate over provisions to arbitrate in the employment context. *Bonta*, 62 F.4th at 486 ("AB 51 deters an employer from including non-negotiable arbitration requirements in employment

2. The "Patients Bill of Rights" (*see* Health & Safety Code § 1430; Cal. Code Regs., tit. 22, § 72527) provides a limited private right of action in favor of a resident or patient of a nursing home for the facility's alleged regulatory violations, including civil penalties and attorney fees. *Jarman v. HCR Manorcare, Inc.*, 10 Cal.5th 375, 384-85 (2020). *Valley View* permanently enjoined the California Department of Public Health from enforcing this limitation on the arbitration of disputes in the context of long-term care contracts between residents and providers, *citing Marmet, Concepcion,* and other FAA precedents. Logan's action alleged such claims. (App. 43a.)

contracts by imposing civil and criminal sanctions on any employer who does so."). Relying on this Court's FAA precedents (e.g., *Kindred*, *Marmet* and *Casarotto*), the Ninth Circuit held that these obstacles to arbitration were preempted. *Id*. at 482-84.

Another controversial California law, Code of Civil Procedure sections 1281.97 – 1281.99, mandates that if the party who drafts a consumer or employment arbitration contract is tardy in paying arbitration costs, this amounts to a "material breach" that forfeits the right to arbitrate. California cases are split over whether this late payment penalty is preempted by the FAA. *Cf. Hernandez v. Sohnen Enterprises, Inc.*, 102 Cal.App.5th 222, 243 (2024) (majority opinion holding that the FAA preempts the late payment provisions); *Hohenshelt v. Superior Court*, 99 Cal.App.5th 1319, 1325 (2024), *review granted* (Cal. S. Ct. No. S284498) 2024 Cal. Lexis 3125 (majority opinion holding the statutes are "not preempted").

This disagreement prompted the dissenting justice in *Hohenshelt* to remark: "Judged by actions, California law over the last few decades … has not been a friend of arbitration …. [¶] Over and over again, with determined but unavailing persistence, the Supreme Court of the United States has rebuked California state law that continues to find new ways to disfavor arbitration." *Hohenshelt*, 99 Cal. App.5th at 1327 (Wiley, J., dissenting). *Citing Kindred*, the dissent pointed to six examples in which this Court held that a California state law or judicial rule had "single[d] out arbitration agreements for disfavored treatment." *Id*. at 1327-28.

Harrod presents another.

Petitioners urged the California Supreme Court to adhere to the common sense view that prevailed in this State for over 40 years – agreeing to arbitrate disputes with medical providers is a "'proper and usual' exercise of an agent's powers" in the course of "the health care decisionmaking process." *Hogan*, 148 Cal.App.4th at 266-67; *Madden*, 17 Cal.3d at 707 ("The agent today who consents to arbitration follows a 'proper and usual' practice 'for effecting the purpose' of the agency.").

Petitioners' arguments were supported by every major health care provider association in this State as amici curiae – the California Medical Association (50,000 member physicians practicing in California), the California Dental Association (27,000 dentists), the California Hospital Association (over 400 hospitals and health system members), the California Association of Health Care Facilities (representing more than 1,300 skilled nursing homes and long-term care facilities). Members of those groups on a daily basis encounter patients who are incapacitated and must rely on surrogates to express their desires in the course of obtaining medical treatment and health care services.

Members of those provider groups, like Country Oaks and Sun Mar, undoubtedly would be interested in assuring the validity and enforceability of agreements to arbitrate that are voluntarily made by or on behalf of their patients. *Harrod* fails to place such agreements with California health care providers on "equal footing" with those entered into by appointed attorneys-in-fact acting on behalf of principals in their dealings with other businesses and professionals, such as, attorneys, accountants, realtors, financial advisors, hair stylists, plumbers, or electricians.

California's HCDL adopts the general rules of agency where the agreement is silent about the principal's "wishes" or "instructions" about health care decisions. (Prob. Code § 4688.) The *Harrod* opinion fails to explain why a patient in Mr. Logan's position, who may happen to be a union member, would place greater trust and confidence in his "union board" representative than an immediate family member when appointing an agent to negotiate contracts with a medical provider. The union representative may act as "agent" for thousands of members, as in *Madden,* while Harrod is acting the "agent" solely for his uncle. It makes no sense, logically or legally, to say that the union representative would have the implicit authority to enter into arbitration agreements, whereas Mr. Harrod does not. (*Cf. Harrod*, App. 30a-31a.)

The "decoupling" analysis is also unpersuasive. As *Madden* teaches, the agent who exercises his powers to make health care decisions, whether "selecting arbitration as a contract term [or consenting to such an agreement offered separately,] serves the purpose of statutorily authorized contract negotiation …." (App. 30a-31a, bracketed text added.)

On this record, the "statutorily authorized contract" is the skilled nursing facility admission agreement utilizing statutory forms required by Health & Safety Code sections 1599.61 and 1599.81. Whether "arbitration" was presented to the agent by the health care provider as an "option" within the admission agreement (as allowed in some states), or as a "standalone" contract as required by section 1599.81(b), "the agent who consents to arbitration follows a 'proper and usual' practice 'for effecting the purpose' of the agency." *Madden*, 17 Cal.3d at 707.

Harrod holds that, regardless of whether the agent is appointed under a "general" power of attorney using the forms adopted by the Uniform Powers of Attorney Law (Probate Code § 4000 et seq.) or an "advance directive" under section 4605 of the HCDL, either appointment will now require the patient's "clear statement" of authority before the agent may to consent to arbitration.

This is contrary to *Kindred*: California's "clear statement rule appears not to apply to other kinds of agreements relinquishing the right to go to court or obtain a jury trial." *Kindred*, 581 U.S. at 252, n.1.

Harrod thereby contravenes the FAA's edict against "disfavoring" the formation of arbitration agreements made by an appointed "health care" agent and imposes obstacles to enforcement preempted by the Supremacy Clause. *Kindred,* 581 U.S. at 251-52, 255-56; *Marmet*, 565 U.S. at 533-34; *Casarotto*, 517 U.S. at 688.

CONCLUSION

Given the clear conflict between *Harrod* and this Court's precedents, the Court may wish to consider summarily reversing the decision below. If the Court believes that neither plenary review nor summary reversal is warranted, it may also wish to consider granting, vacating, and remanding consistent with those precedents (e.g., *Kindred*, et al.) as it has done in *Marmet* and other FAA preemption cases. If allowed to stand, *Harrod* will promote the adoption of interpretation rules disfavoring arbitration that will negatively impact providers of essential medical services in California and elsewhere.

For all these reasons, this Court should grant a writ of certiorari to review the decision of the California Supreme Court.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF CALIFORNIA, FILED MARCH 28, 2024

IN THE SUPREME COURT OF CALIFORNIA

S276545

Second Appellate District, Division Four,
No. B312967

Los Angeles County Superior Court
20STCV26536

MARK HARROD,

Plaintiff and Respondent,

v.

COUNTRY OAKS PARTNERS, LLC, *et al.*,

Defendants and Appellants.

March 28, 2024, Opinion Filed

Justice Jenkins authored the opinion of the Court, in which Chief Justice Guerrero and Justices Corrigan, Liu, Kruger, Groban, and Evans concurred.

Opinion of the Court by Jenkins, J.

Under California's Health Care Decisions Law (Prob. Code, § 4600 et seq.),[1] a principal may appoint a health

1. Unless specified, further statutory references are to the Probate Code.

care agent to make health care decisions should the principal later lack capacity to make them. In this case, a health care agent signed two contracts with a skilled nursing facility. One, with state-dictated terms, secured the principal's admission to the facility. The other made arbitration the exclusive pathway for resolving disputes with the facility. This second contract was optional and had no bearing on whether the principal could access the facility or receive care. The issue before us is whether execution of the second, separate, and optional contract for arbitration was a health care decision within the health care agent's authority. It was not, and the facility's owners and operators may not, therefore, rely on the agent's execution of that second agreement to compel arbitration of claims arising from the principal's alleged maltreatment that have been filed in court. We affirm the judgment of the Court of Appeal and remand for further court proceedings.

I. BACKGROUND

The Health Care Decisions Law authorizes competent adults to draft powers of attorney for health care, a type of advance health care directive, and thereby "authorize [an] agent to make health care decisions." (§ 4671, subd. (a); see §§ 4605, 4629.) The law defines "health care" as "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental health condition." (§ 4615.) It further defines a "health care decision" as one "regarding the patient's health care, including . . . [¶] (1) Selection and discharge of health care providers and institutions[;] [¶] (2) Approval or disapproval

of diagnostic tests, surgical procedures, and programs of medication, including mental health conditions[;] [¶] (3) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation." (§ 4617, subd. (a).) "Subject to any limitations in the power of attorney for health care," an agent "may make health care decisions" and "may also make decisions that may be effective after the principal's death," such as approving organ donation, autopsies, disposition of remains, and records releases. (§ 4683.)

A competent adult desiring a power of attorney for health care may, but need not, use the form found in section 4701. (§ 4700.) Regardless of whether the adult executes this "form or any other writing" to establish a power of attorney, the provisions of the Health Care Decisions Law "govern the effect" of the writing. (*Ibid.*)

Charles Logan executed a power of attorney for health care. He used, not the statutory form, but a California Medical Association form patterned on, and specifically citing to, the Health Care Decisions Law. Logan appointed his nephew, Mark Harrod, as his "health care agent" to make "health care decisions" should Logan's primary physician find Logan unable to make those decisions himself. Paraphrasing the portions of the Health Care Decisions Law defining health care decisions (§ 4617) and decisions after death (§ 4683), the form Logan signed authorized Harrod to (1) "consent, refuse consent, or withdraw consent to any medical care," including care to artificially sustain life; (2) "choose or reject [the principal's]

physician, other health care professionals or health care facilities"; (3) "receive and consent to the release of medical information"; and (4) authorize organ donation, an autopsy, and disposal of remains.

About two years after executing this power of attorney, Logan, then approaching his 77th birthday, fell, broke a femur, and became unable to walk. He entered the Country Oaks Care Center (Country Oaks), a skilled nursing facility, to obtain living assistance and rehabilitative treatment. Harrod signed two agreements with the facility on Logan's behalf. The first was an admission agreement that entitled Logan to care at the facility and specified the services to be rendered, payment terms, and facility rules. It was unalterable and its terms were state mandated. (Health & Saf. Code, § 1599.61 ["all skilled nursing facilities . . . shall use a standard admission agreement developed and adopted by the" state and "[n]o facility shall alter" it unless directed].) The second agreement Harrod signed was an arbitration agreement. Per the requirements of state law applicable to long-term health care facilities and federal regulations governing such facilities participating in Medicare and Medicaid, the arbitration agreement appeared on a separate form and was presented as optional. (See *id.*, § 1599.81, subds. (a), (b) [an arbitration agreement must not be a precondition to facility admission and must "be included on a form separate from the rest of the admission contract"]; 42 C.F.R. § 483.70(n) (2019) [facilities participating in Medicare and Medicaid "must not require any resident or his or her representative to sign an agreement for

binding arbitration as a condition of admission"].)[2] A boxed warning atop this agreement stated, "READ CAREFULLY—Not Part of Admission Agreement," and continued, "Resident shall not be required to sign this arbitration agreement as a condition of admission to this facility or to continue to receive care at the facility."[3] The arbitration agreement stated disputes concerning

2. Neither compliance with, nor the enforceability of, the requirements for arbitration agreements under Health and Safety Code section 1599.81 or 42 C.F.R. § 483.70 (2019) is before us.

3. The admissions paperwork also included a one-page form stating, "I, Logan Charles, am able to sign for myself but would to like [*sic*] authorize Harrod Mark my nephew to sign the following documents on my behalf." Below this statement, six categories of documents are listed and next to each is a line with a check mark. The checked categories of documents are: temporary consent to treat, advance directive acknowledgement, influenza vaccine/ pneumonia vaccine consent, POLST (physician orders for life-sustaining treatment), informed consent for use of device, and California admission packet. Below these selected options is a line on which to print the patient's name, with "Logan Charles" written in. To the right is a line for the patient's signature with a script signature reading "Mark Harrod." Country Oaks mentions this form in its opening brief but does not argue it has any significance to the question we face here. Thus, we need not decide whether this form gave Harrod permission to sign the California admission packet or, if it did, whether it authorized Harrod to agree to arbitration. Nor need we address the possibility that Logan, through this form or by any other act, led defendants to believe Harrod had authority to act under a theory of ostensible agency. (See Civ. Code, § 2300 ["An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him"].)

medical care, the provision of services, and the admission agreement or arbitration agreement would be arbitrated, not litigated in court. Under the agreement, both parties abjured "their constitutional right to have any such dispute decided in a court of law before a jury."

Based on the care he received during his approximately one-month stay at Country Oaks, Logan, with Harrod acting as his guardian ad litem,[4] filed a lawsuit in a California superior court against the facility's owners and operators, Country Oaks Partners, LLC, and Sun-Mar Management Services, Inc. Logan alleged these defendants negligently withheld appropriate care, resulting in Logan suffering a second fall and fracture, being unnecessarily diapered, and developing pressure ulcers. In addition to pleading a cause of action for common law negligence, Logan asserted causes of action for elder abuse and violations of his right as a resident of a skilled nursing facility (Health & Saf. Code, § 1430, subd. (b)). Logan further asked the superior court for a declaration that he was not bound by the arbitration agreement that his health care agent, Harrod, had signed.

Defendants moved to compel arbitration. The superior court denied the motion. It reasoned Harrod's power to

4. Ad litem means "for the suit" in Latin. (Black's Law Dict. (11th ed. 2019) p. 53.) "When . . . a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case." (Code Civ. Proc., § 372, subd. (a)(1).)

make health care decisions for Logan as his health care agent did not encompass the power to sign the optional arbitration agreement. The Court of Appeal affirmed, agreeing that a health care decision does not encompass optional, separate arbitration agreements presented alongside mandatory facility admissions paperwork. (*Logan v. Country Oaks Partners, LLC* (2022) 82 Cal. App.5th 365 [297 Cal. Rptr. 3d 903].) Several courts of appeal have reached the opposite conclusion regarding a health care agent's health care decisionmaking authority. (See, e.g., *Garrison v. Superior Court* (2005) 132 Cal. App.4th 253, 255 [33 Cal. Rptr. 3d 350] ["The revocable arbitration agreements were executed as part of the health care decisionmaking process."]; *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 268 [55 Cal. Rptr. 3d 450] [agreeing with *Garrison*].) We now, in the context of Logan's power of attorney for health care, address this conflicting authority.[5]

II. DISCUSSION

The parties assume Harrod's selection of a skilled nursing facility for Logan, pursuant to the first, mandatory contract for admission, was within the scope of Harrod's agency. They disagree, however, whether Harrod's authority to make "health care decisions"—as granted by Logan's power of attorney for health care—encompassed

5. Because Logan passed away while this case was pending before us, Harrod, as Logan's successor in interest, is now the named plaintiff and respondent. We only discuss Harrod's authority as Logan's agent pursuant to the power of attorney for health care.

Harrod's separate and optional decision, pursuant to the second contract, to bind Logan to arbitrate disputes with the facility.

The meaning of a "health care decision" in Logan's power of attorney is firmly linked to the meaning of that term in the Health Care Decisions Law. That law, which authorizes powers of attorney for health care (§ 4671), provides a definition of the term "health care decisions" (§ 4617) and instructs that its provisions "govern the effect" of writings created under its authority (§ 4700). In turn, Logan's power of attorney, at its very top, indicates that it is created under the authority of the Health Care Decisions Law, invoking the Probate Code sections 4600–4805 that contain the law. Intention is the pole star when interpretating written instruments. (See Civ. Code, § 1636; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288 [172 Cal. Rptr. 3d 653, 326 P.3d 253]; *Boyer v. Murphy* (1927) 202 Cal. 23, 28 [259 P. 38] [intent is "pole-star" in interpreting deed]; *Todd v. Superior Court of San Francisco* (1919) 181 Cal. 406, 419 [184 P. 684] [seeking "the general intent or predominant purpose of the instrument"]; *Sullivan v. Davis* (1854) 4 Cal. 291, 292 [describing power of attorney language as an "index of intention"].) Logan's intention to invoke and be governed by the Health Care Decisions Law, in this case, seems plain. Moreover, neither party to this case asserts any deviation between the meaning of "health care decision" in Logan's power of attorney and the Health Care Decisions Law. (Cf. § 4681 ["Except as provided in subdivision (b), the principal may limit the application of any provision of this division" in the power of attorney].)

Thus, we interpret Logan's power of attorney by reference not only to its terms, but also to the relevant statutory provisions that govern it. (Cf. *Montrose Chemical Corp. of California v. Superior Court* (2020) 9 Cal.5th 215, 226 [260 Cal. Rptr. 3d 822, 460 P.3d 1201] [reading insurance agreement "in light of background principles of insurance law"]; *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 231 [178 Cal. Rptr. 343, 636 P.2d 32]; *Swenson v. File* (1970) 3 Cal.3d 389, 393, 394 [90 Cal. Rptr. 580, 475 P.2d 852] [contracting parties "'are presumed to know and to have had in mind'" the "existing law"].)

Additionally, the Health Care Decisions Law instructs that when it "does not provide a rule governing agents under powers of attorney, the law of agency applies." (§ 4688.) Absent disputed facts, the meaning of a written instrument (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604 [100 Cal. Rptr. 3d 622, 217 P.3d 1194]), questions of statutory interpretation (*Davis v. Fresno Unified School Dist.* (2023) 14 Cal.5th 671, 687 [307 Cal. Rptr. 3d 568, 528 P.3d 1]), and the scope of an agent's authority (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 658 [186 Cal. Rptr. 578, 652 P.2d 426]; *Oswald Machine & Equipment, Inc. v. Yip* (1992) 10 Cal. App.4th 1238, 1247 [13 Cal. Rptr. 2d 193]) are matters we determine independently as a matter of law. With these governing standards in mind, we probe the meaning of "health care decision" under Logan's power of attorney, the Health Care Decisions Law, and the law of agency.

Appendix A

A. "Health Care Decision" in the Power of Attorney and Statute

Whether interpreting a provision of a written instrument or statute, we seek the drafters' intent, and we start with the plain meaning of the provision's text and with its context within the statute or instrument. (*People v. Braden* (2023) 14 Cal.5th 791, 804 [308 Cal. Rptr. 3d 846, 529 P.3d 1116] [statutes]; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc., supra*, 59 Cal.4th at p. 288 [written instruments].) When a power of attorney is at issue, we have highlighted the importance of plain meaning by stating an agent operating under a power of attorney may not "go beyond it nor beside it." (*Blum v. Robertson* (1864) 24 Cal. 127 [24 Cal. 128, 140]; see also *Johnston v. Wright* (1856) 6 Cal. 373, 375.)

1. Definitional Provisions

As noted above, the Health Care Decisions Law specifies a "health care decision" is one "regarding the patient's health care" (§ 4617, subd. (a)), with "health care" defined as "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental health condition" (§ 4615). Logan's power of attorney does not quote these basic definitional provisions. But Logan's power of attorney, as well as the Health Care Decisions Law, both inform our interpretation of the term "health care decision" by listing equivalent examples. Section 4617 states health care decisions include "[s]election and discharge of health care providers and institutions." (§ 4617, subd. (a)(1).) Logan's power of

attorney allows the agent to "choose or reject . . . health care professionals or health care facilities." Section 4617 also provides that health care decisions include "[a]pproval or disapproval of diagnostic tests, surgical procedures, and programs of medication, including mental health conditions" (§ 4617, subd. (a)(2)), and also whether "to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation" (§ 4617, subd. (a)(3)). Logan's power of attorney likewise authorizes these types of decisions, allowing the agent to consent to or refuse "tests, drugs, surgery," "any medical care or services," or "the provision, withholding, or withdrawal of artificial nutrition and hydration . . . and all other forms of health care, including cardiopulmonary resuscitation." Logan's power of attorney, in accord with other provisions of the Health Care Decisions Law (§§ 4678, 4683), further permits the agent to receive and release medical records so the agent can perform his or her duties and to make decisions regarding disposition of the body after death.

Established canons of statutory construction assist us in ascertaining the meaning of a term primarily defined by way of a list of examples and the meaning of examples enumerated on such a list. "'[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.'" (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343 [110 Cal. Rptr. 3d 628, 232 P.3d 625].) When we consider the meaning of one item on a list, we tend to adopt a more "restrictive

meaning" when to do otherwise would "make the item markedly dissimilar to the other items in the list." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012 [9 Cal. Rptr. 2d 358, 831 P.2d 798].) When a general term is defined through a list of examples, we tend towards a definition of the general term that is in concert with the items listed. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 159 [202 Cal. Rptr. 3d 447, 370 P.3d 1011]; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342 [64 Cal. Rptr. 3d 693, 165 P.3d 488]; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 294 [64 Cal. Rptr. 3d 661, 165 P.3d 462]; see also Civ. Code, § 3534 ["Particular expressions qualify those which are general."].) These guidelines have particular force when, as here, there is no broadening catchall provision amongst the listed items. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 807 [47 Cal. Rptr. 3d 248, 139 P.3d 1196].)

These canons of construction weigh against construing the authority to select health care providers and institutions (§ 4617, subd. (a)) to include the power to enter optional, separate dispute resolution agreements, and against interpreting the general term "health care decision" that expansively. Each enumerated example of a health care decision in the Health Care Decisions Law and in Logan's power of attorney directly pertains to who provides health care and what may be done to a principal's body in health, sickness, or death. There is no catchall provision, no express delegation of power to make decisions that serve other purposes, and no express grant

of power to waive access to the courts, agree to arbitration, or to otherwise negotiate about or accept any dispute resolution method. A standalone arbitration agreement would be "markedly dissimilar" (*Moore v. California State Bd. of Accountancy, supra*, 2 Cal.4th at p. 1012) from agreements about who provides medical care or what care they provide. Thus, defining the term "health care decision" to include a standalone arbitration agreement would not be "in concert with" (*Winn v. Pioneer Medical Group, Inc., supra*, 63 Cal.4th at p. 159) the items listed and, therefore, with the apparent intent evidenced by the definitional provisions of Logan's power of attorney or the Health Care Decisions Law it invokes.

2. Further Context

Other portions of Logan's power of attorney, as well as the Health Care Decisions Law and the Probate Code, support this interpretation of the term "health care decision." (See *People v. Braden, supra*, 14 Cal.5th at p. 841 [""""""[W]e consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."""""]; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc., supra*, 59 Cal.4th at p. 288 [we interpret the language of a written instrument "in context"].)

We start with the Health Care Decisions Law's enacted legislative findings. The Legislature couched the law as recognizing "the dignity and privacy a person has

a right to expect" and the "fundamental right to control the decisions relating to [one's] own health care, including the decision to have life-sustaining treatment withheld or withdrawn." (§ 4650, subd. (a).) The Legislature referenced "[m]odern medical technology" and the "artificial prolongation of human life" while noting the need to protect "individual autonomy" and the "dignity" of patients facing end of life scenarios. (*Id.*, subd. (b).) These findings reflect that the Health Care Decisions Law's roots trace back to California's pioneering "living will" statute, passed in 1976, and the principle that advanced health care directives are intended to ensure a patient's consent to medical treatment. (See Sabatino, *The Evolution of Health Care Advance Planning Law and Policy* (2010) vol. 88, No. 2, 16 Milbank Q., 212–214.) These findings also align with a view of health care decisions as personal, private, and about treatment. This tends to suggest that neither the Legislature nor Logan would have viewed decisions well beyond this ambit—such as whether to select optional arbitration—as health care decisions.

In addition, explanatory language within the Health Care Decisions Law's optional form for advance health care directives and within Logan's power of attorney both point in the same direction as the legislative findings. The statutory form begins by explaining to the potential principal, "You have the right to give instructions about your own physical and mental health care. You also have the right to name someone else to make those health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of

your primary physician." (§ 4701.) The form goes on to state that an agent whose health care decisionmaking power is not otherwise limited may make decisions about health care and about disposition of remains and autopsies after death, mirroring the language of sections 4617 and 4683. (§ 4701.) The form's actual grant of health care decisionmaking authority states, "My agent is authorized to make all physical and mental health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here." (*Ibid.*) The form thus equates health care decisions with "instructions about [the principal's] physical and mental health care." (*Ibid.*) The California Medical Association form that Logan used contained similarly limited explanatory language: "This form lets you give instructions about your future health care. . . . Your agent must make health care decisions that are consistent with the instructions in this document and your known desires. It is important that you discuss your health care desires with the person(s) you appoint as your health care agent, and with your doctor(s)." Notably absent from the form and Logan's power of attorney is any suggestion that an appointed health care agent is authorized to make decisions concerning dispute resolution.

In assessing what a health care decision includes, it is also helpful to consider what the Legislature appears to have viewed as *not* amounting to such decisions. For example, the Health Care Decisions Law distinguishes health care decisions (see § 4617) from "decisions relating to personal care," which a principal may optionally

delegate in a power of attorney for health care (§ 4671, subd. (b)). Personal care decisions include "determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment." (*Ibid.*) The statute further contrasts the making of health care decisions with the nomination of a conservator of the person or estate. (§ 4672.) And although a power of attorney for health care may, as Logan's does, permit an agent to make "decisions that may be effective after the principal's death" (§ 4683)—including directing the disposition of remains, an autopsy, or the release of records—these decisions, too, are set forth outside the statutory definition of health care decisions. (§ 4617; see §§ 4678, 4683.) That the Health Care Decisions Law specifically permits delegation of some arguably collateral decisions, such as those pertaining to medical records or disposition of remains, suggests other, unspecified decisions—such as a separate, optional decision regarding dispute resolution—fall outside the bounds of what legislators and principals to a power of attorney for health care would consider a health care decision.

The definition of powers under the Health Care Decisions Law (contained in div. 4.7 of the Prob. Code) contrasts with the definition of powers under the Uniform Statutory Form Power of Attorney Act (§ 4400 et seq.), a subsidiary of the Power of Attorney Law (§ 4000 et seq.) (both contained in div. 4.5 of the Prob. Code). The Power of Attorney Law governs powers of attorney "with respect to all lawful subjects and purposes" (§ 4000 et seq.; see § 4123) and the Uniform Statutory Form Power of Attorney

Act streamlines creation of such documents, enabling easy delegation of statutorily defined powers (§ 4123; see §§ 4400 et seq., 4401, 4450–4463). We should be attuned to differences in laws that are statutory neighbors and have, as shall be explained, provisions that share history or interrelate. (See *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1108 [133 Cal. Rptr. 3d 738, 264 P.3d 579] [""“where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes”""]; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190 [48 Cal. Rptr. 3d 108, 141 P.3d 225] ["specific enumeration . . . in one context, but not in the other, weighs heavily"]; see also *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 144 [246 Cal. Rptr. 3d 591, 439 P.3d 1156] ["we interpret statutory language . . . in light of . . . analogous provisions" and in "the context of its neighboring provisions"].)

The Power of Attorney Law, the Uniform Statutory Form Power of Attorney Act, and the predecessor to the Health Care Decisions Law—which governed durable powers of attorney for health care decisionmaking[6]—

6. The 1994 law governing durable powers of attorney for health care empowered designated attorneys in fact to make health care decisions, defined, then, as "consent, refusal of consent, or withdrawal of consent to health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any health care." (Former § 4612.) The Law Revision Commission

were codified by a single, integrated enactment in 1994. (Stats. 1994, ch. 307, § 16, pp. 1983–2038; see Legis. Counsel's Dig., Sen. Bill No. 1907 (1993–1994 Reg. Sess.) 5 Stats. 1994, Summary Dig., p. 117.) The bill enacting the Health Care Decisions Law in 1999, which revised and recast the 1994 provisions authorizing durable powers of attorney for health care, acknowledged the Power of Attorney Law and the Uniform Statutory Form Power of Attorney Act, referencing both in making "related and conforming changes." (See Stats. 1999, ch. 658, §§ 27–36, pp. 4853–4856; see Legis. Counsel's Dig., Assem. Bill No. 891 (1999–2000 Reg. Sess.) 5 Stats. 1999, Summary Dig., p. 296.)

The Uniform Statutory Form Power of Attorney Act offers a form that lists categories of statutorily

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comments accompanying the Health Care Decisions Law stated that new section 4617, defining "health care decision" under the current law, "supersedes former Section 4612 and is the same in substance as Section 1(6) of the Uniform Health-Care Decisions Act (1993), with the substitution of the reference to cardiopulmonary resuscitation . . . for the uniform act reference to orders not to resuscitate. Adoption of the uniform act formulation is not intended to limit the scope of health care decisions applicable under former law. Thus, like former law, this section encompasses consent, refusal of consent, or withdrawal of consent to health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any health care. Depending 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." (Cal. Law Revision Com. com., Deering's Ann. Prob. Code (2019 ed.) foll. § 4617, p. 515.)

defined powers that a principal may choose to delegate. (§§ 4400, 4401, 4450–4463.) By placing initials next to a listed, predefined power, the principal may authorize an agent to act in "any lawful way with respect to the . . . initialed subjects," which include real or personal property transactions, banking transactions, business operating transactions, beneficiary transactions, claims and litigation, or personal and family maintenance. (§ 4401.) The preamble to the form states, "THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU." (§ 4401; see Stats. 1994, ch. 307, § 16, p. 1983.) This admonition dovetails with the Legislature's prescription that the Power of Attorney Law applies to "[s]tatutory form powers of attorney" but not to "powers of attorney for health care" under the Health Care Decisions Law. (§ 4050, subd. (a)(2), (1); see Stats. 1999, ch. 658, § 27, p. 4853.)

Looking at the definitions of the powers selectable under the Uniform Statutory Form Power of Attorney Act—powers the statute distinguishes from health care decisions—there are notable inclusions. For instance, the power to make decisions about "personal and family maintenance" includes the power to "[p]ay for . . . necessary medical, dental, and surgical care, hospitalization, and custodial care." (§ 4460, subd. (a)(3).) The power to make decisions about "claims and litigation," moreover, includes the power to "[s]ubmit to arbitration . . . with respect to a claim or litigation" and to "execute and file or deliver a . . . waiver, . . . agreement, or other instrument in connection with the prosecution, settlement, or defense of

a claim or litigation." (§ 4459, subds. (d), (e).) Additionally, for each power granted in a statutory form power of attorney—be it a power over personal maintenance or other matters—the agent is separately authorized, in exercising power for that subject, to do a variety of things, including to "[p]rosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor or against the principal," and to "do any other lawful act with respect to the subject." (§ 4450, subds. (d), (j); see *id.*, subd. (b).)

Comparing the Health Care Decisions Law and the Uniform Statutory Form Power of Attorney Act is instructive in several ways. We first note the Legislature's specific references in the Uniform Statutory Form Power of Attorney Act to an agent's power to settle claims or submit claims to arbitration. Such references are absent from the Health Care Decisions Law. The "specific enumeration" of these powers in the power-defining provisions of the Uniform Statutory Form Power of Attorney Act "weighs heavily against" implying similar or related powers in the context of a health care decision defined under the Health Care Decisions Law. (*Wells v. One2One Learning Foundation, supra*, 39 Cal.4th at p. 1190.) We next note the Uniform Statutory Form Power of Attorney Act expressly acknowledges a distinction between the decisions it authorizes, such as those related to claims and litigation, and health care decisions. In particular, the warning atop the traditional power of attorney form cautions, in block capital letters, that it does not authorize health care decisions. (§ 4401.)

Furthermore, in discerning the scope of the term "health care decision," as envisioned by the Legislature and, in turn, Logan's power of attorney, our precedent instructs we should not only address the differences in the various Probate Code provisions, but strive to harmonize them, avoiding anomalies. (*First Student Cases* (2018) 5 Cal.5th 1026, 1035 [236 Cal. Rptr. 3d 826, 423 P.3d 953] ["We construe statutory language in the context of the statutory framework, seeking to discern the statute's underlying purpose and to harmonize its different components"].) Defining health care decisions as including decisions about dispute resolution that are not necessary for health care might create unnecessary tension between the two regimes for powers of attorney and between agents designated under them. Doing so, for example, could undermine the expectations of a principal who designates one agent to make health care decisions and another agent, under the form power of attorney, to make decisions about claims and litigation. A principal executing both form powers of attorney found in sections 4401 and 4701 could readily view health care decisions as separate from decisions involving claims and litigation, because the forms expressly make this distinction. In that case, the principal might expect and prefer the agent in charge of claims and litigation to accept or reject optional arbitration agreements. A broad construction of the term health care decision might, therefore, and contrary to the principal's expectations, "override" a grant of power over claims and litigation decisions. (See *Johnson v. Kindred Healthcare, Inc.* (2014) 466 Mass. 779 [2 N.E.3d 849, 856, 859] [reaching a similar conclusion under Massachusetts

law].)[7] On the other hand, if arbitration is, as here, not a condition of treatment, a health care agent's lack of authority to enter arbitration agreements would not deprive a principal of health care. (Cf. *Owens v. National Health Corp.* (S.Ct.Tenn. 2007) 263 S.W.3d 876, 885 [raising this concern regarding arbitration agreements included in a contract required for admission].)

Moreover, interpreting the term "health care decision" to exclude optional and separate agreements to arbitrate fits best with the Legislature's decision to use that term in the Health Care Decisions Law to describe the scope of authority not only for those (like Harrod) who act pursuant to powers of attorney for health care, but also for surrogates, including next of kin or close friends. These surrogates may be selected by the patient in haste upon entering a facility (§ 4711)[8] or selected for the patient by

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7. In line with this observation, we disapprove dicta in *Hutcheson v. Eskaton FountainWood Lodge* (2017) 17 Cal. App.5th 937, 956–957 [225 Cal. Rptr. 3d 829], suggesting a person empowered to make decisions about all a principal's claims and litigation lacks authority to do so when the party across the contracting table is a health care facility or provider. We have no occasion to address *Hutcheson*'s ultimate concern: whether an agent with power over claims and litigation, but without power over health care decisions, may agree to arbitration with a health care facility with whom the agent had no right to contract for services in the first instance. (See *id.* at p. 957.)

8. "A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider or a designee of the health care facility caring for the patient. The designation of a surrogate shall be promptly recorded in the patient's health care record." (§ 4711, subd. (a).)

a provider or facility when there is no recognized health care decision maker (§ 4712).[9] One of the purposes of the Health Care Decisions Law was to "set[ ] out uniform standards for the making of health care decisions by third parties," whether by conservators, agents, or surrogates. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 539–540 [110 Cal. Rptr. 2d 412, 28 P.3d 151]; see § 4617 [defining a health care decision as one "made by a patient or the patient's agent, conservator, or surrogate"].)

Before the Health Care Decisions Law's enactment, Health and Safety Code section 1418.8 addressed the ability of next of kin to represent residents in skilled nursing facilities or intermediate care facilities who lacked capacity to make health care decisions. (Health & Saf. Code, § 1418.8; see Stats. 1992, ch. 1303, § 1, pp. 6326–6328.) Under that provision, when "there is no person with legal authority to make . . . decisions" "concerning [a] resident's health care," an attending physician at the facility, after following certain procedures, may pursue an intervention that would otherwise require informed consent. (Health & Saf. Code, § 1418.8, subd. (a).) A person with legal authority to make these decisions includes a "next of kin." (*Id.*, subd. (c).) Our appellate courts have held that next of kin, whether empowered to make medical decisions either under this statute or through principles of ostensible agency, lack authority to enter separate, optional arbitration agreements with nursing facilities.

9. Under specified conditions, "a health care provider or a designee of the health care facility caring for the patient may choose a surrogate to make health care decisions on the patient's behalf, as appropriate in the given situation." (§ 4712, subd. (b).)

(*Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal. App.4th 298, 302 [120 Cal. Rptr. 2d 892] [applying Health & Saf. Code, § 1418.8 and concluding "Defendants do not explain how the next of kin's authority to make medical treatment decisions for the patient at the request of the treating physician translates into authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home"]; *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 377 [19 Cal. Rptr. 3d 819] [applying ostensible agency to reach a similar conclusion]; *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal. App.4th 581, 594 [55 Cal. Rptr. 3d 823] [applying Health & Saf. Code, § 1418.8 and concluding "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. Rather, an arbitration agreement pertains to the patient's legal rights, and results in a waiver of the right to a jury trial"].)

The Health Care Decisions Law built on Health and Safety Code section 1418.8, and it expressly allows a health care provider or health care facility designee to appoint, as needed, next of kin and other close family or friends as surrogates.[10] (§ 4712, added by Stats. 2022, ch. 782, § 2;

10. The uniform act underlying California's Health Care Decisions Law and the initial draft of California's law would have allowed next of kin to become surrogates. (2000 Health Care Decisions Law and Revised Power of Attorney Law (Mar. 2000) 30 Cal. Law Revision Com. Rep. (2000) pp. 25–31.) That draft of the law, as noted in Law Revision Commission's report, would have expanded the "next of kin" provision applicable to medical

2000 Health Care Decisions Law and Revised Power of Attorney Law, *supra*, 30 Cal. Law Revision Com. Rep. at p. 18.) Thus today, the health care decision maker for an incapacitated patient is, first, a patient-selected surrogate, second, a patient's "agent pursuant to an advance health care directive or a power of attorney for health care," third, a "conservator or guardian of the patient having the authority to make health care decisions for the patient," and, fourth, a close family member or friend designated by a health care provider or facility. (§ 4712, subds. (a), (b); see also § 4643 ["'Surrogate' means an adult, other than a patient's agent or conservator, authorized under this division to make a health care decision for the patient"].)

The Legislature's decision to invest in each of these four categories of representatives the authority to make "health care decisions" further suggests, whether or not the power of each type of representative is fully equivalent, that the Legislature intended the authority to make health care decisions to concern matters more closely related to health care. The authority to make health care decisions may devolve upon not only agents

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treatment decisions in nursing homes to health care decisions in other contexts. (2000 Health Care Decisions Law and Revised Power of Attorney Law, at p. 18.) But legislators could not agree, at that time, on the provisions governing who could become a surrogate in the absence of any choice by the patient or action by a court. (See 1 Zimring & Bashaw, Cal. Guide to Tax, Estate & Financial Planning for the Elderly (2023) § 3.04.) Initially, then, the law simply allowed patients to designate or disqualify surrogates, but did not set forth a process for how next of kin might be selected for this role. (Former §§ 4711, 4715.)

carefully selected in advance, but also on surrogates the principal chooses in emergency situations or even those the health care provider chooses itself. Because the statute gives both agents and as-needed surrogates authority to make health care decisions, that authority, when exercised pursuant to a power of attorney such as Logan's, is not best understood as relating to every possible aspect of a transaction with a skilled nursing facility, such as optional, separate agreements that do not affect health care or the selection of the facility.[11]

B. Agency Law

Defendants, the facility owners and operators, contend Civil Code section 2319, part of our state's law of agency, imbued Logan's health care decisionmaking agent with authority to agree to arbitration. As noted above, where the Health Care Decisions Law "does not provide a rule governing agents under powers of attorney, the law of agency applies." (§ 4688.) Since 1872, section 2319 of the Civil Code has conferred an agent with authority

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11. We may consult other indicia of legislative intent, including legislative history or public policy, to derive a statute's meaning if statutory language, read in context, "permits more than one reasonable interpretation." (*People v. Braden, supra*, 14 Cal.5th at p. 804.) Here, neither defendants nor their supporting amici curiae identify legislative history that casts doubt on our proposed construction of "health care decision." Nor do their policy arguments about the general cost-savings benefits of arbitration convince us to "'strain to discern (because we are not free to impose)'" a different meaning. (*Bernard v. Foley, supra*, 39 Cal.4th 794, 814.)

"[t]o do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." (Civ. Code, § 2319, subd. 1.)

Defendants assert selecting arbitration for dispute resolution is a "proper and usual" act for someone otherwise empowered to make health care decisions and to contract with a health care provider. Civil Code section 2319, in defendants' view, either provides guidance on the scope of "health care decisions" otherwise missing from the Health Care Decisions Law or counteracts any narrow construction of "health care decision" otherwise inherent in that law or Logan's power of attorney. Harrod disagrees, asserting there are no gaps in the Health Care Decisions Law and there is nothing about an optional, separate arbitration agreement that effectuates the purpose of health care decisionmaking and Harrod's agency. Harrod's view is closer to the mark.

Civil Code section 2319 embodies the notion of implied authority—that an agent expressly granted a specific power should have sufficient authority to effectuate it. (See *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706 [131 Cal. Rptr. 882, 552 P.2d 1178] (*Madden*); *Robbins v. Pacific Eastern Corp.* (1937) 8 Cal.2d 241, 285 [65 P.2d 42].) This rule is a long-standing feature of agency law. (Story, Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations From the Civil and Foreign Law (8th ed., 1874) § 58, p. 71; Reynolds, Bowstead & Reynolds on Agency (17th ed. 2001) ¶¶ 3-018, 3-019, p. 102;

1 Mechem, A Treatise on the Law of Agency (2d ed. 1914) § 715, p. 502; Rest.3d Agency, § 2.02, com. d, p. 91 and reporter's note d, p. 105.) The assumption is "the principal does not wish to authorize what cannot be achieved if necessary steps are not taken by the agent, and that the principal's manifestation often will not specify all steps necessary to translate it into action." (Rest.3d Agency, § 2.02, com. d, p. 91.)

The nature of the task delegated in a power of attorney itself provides a limit on the powers to be implied. An agent operating under a power of attorney may not "go beyond it nor beside it, though it is competent for [the agent] to perform all such subordinate acts as are usually incident to or necessary to effectuate the object expressed. [¶] In order to bind the principal in such case, it must appear that the act done by the agent was in the exercise of the power delegated, and within its limits." (*Blum v. Robertson, supra*, 24 Cal. at p. 140.) Put another way, an implied power "must be within the ultimate objective of the principal. . . ." (*Garber v. Prudential Ins. Co.* (1962) 203 Cal.App.2d 693, 702 [22 Cal. Rptr. 123], quoting Rest.2d Agency, § 229, com. b, p. 508.) The question is "whether the agent was engaged strictly in an endeavor to bring about a result for which his services were engaged." (*Garber*, at p. 703.) "[G]eneral words in powers of attorney are always limited by the express purposes of the power" such that we have said if an agency may be "fully performed without" an unenumerated power, that power will not be viewed as within the agent's purview. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 794 & fn. 5 [205 Cal. Rptr. 834, 685 P.2d

1185].) To be implied, a power would have to be "in pursuit of 'the said services'" identified in the power of attorney. (*Palomo*, at p. 794, fn. 5.)

In *Madden*, a case defendants view as dispositive to our agency analysis, we addressed the intersection of implied agency, contracting for medical services, and arbitration. We asked "whether an agent or representative, contracting for medical services on behalf of a group of employees, has implied authority to agree to arbitration of malpractice claims of enrolled employees arising under the contract." (*Madden, supra*, 17 Cal.3d at p. 702.) We first noted that the Government Code authorized a state retirement board "to negotiate contracts for group medical plans for state employees" (*id.* at p. 705) and required inclusion of "a grievance procedure to protect the rights of the employees" (*id.* at p. 704). We concluded the board acted as the agent of employees when negotiating contract terms within the scope of its authority. (*Id.* at pp. 705–706; see Gov. Code, § 22793 [empowering the board to contract for health benefit plans].) Thus, the board could, under Civil Code section 2319, agree to things "proper and usual" to further that purpose. (*Madden*, at p. 706.) We then held that arbitration is a "'proper and usual' means of resolving malpractice disputes" and that the board, as an agent "empowered to negotiate a group medical contract" for the state employees, could agree to an arbitration clause. (*Id.* at p. 706.)

Madden is distinguishable.[12] There, a state board had express power, pursuant to statute, to "negotiate contracts for group medical plans" that included a "grievance procedure." (*Madden*, at pp. 705, 704.) Therefore, the state board, under agency law, could adopt proper and usual means in pursuit of this contracting authority, including choosing proper and usual terms for dispute resolution, such as arbitration. In contrast to the statutory grant of authority in *Madden*, the grant of power to Harrod in this case, under a power of attorney for health care, did not mention the power to broadly negotiate contracts or select a dispute resolution method. Rather, it merely granted Harrod the authority to make "health care decisions."

If, under *Madden*, selecting arbitration as a contract term serves the purpose of statutorily authorized contract

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12. Nor does the case *Madden* draws upon in explaining its result, *Doyle v. Giuliucci* (1965) 62 Cal.2d 606 [43 Cal. Rptr. 697, 401 P.2d 1], assist defendants. (See *Madden, supra*, 17 Cal.3d at p. 708.) *Doyle* concluded that a parent's power to enter into a contract for medical services on behalf of a child allows the parent to bind the child to an arbitration provision included within that contract. (*Doyle*, at pp. 607, 610.) No one contends that the nephew-uncle relationship between Harrod and Logan is akin to the parent-child relationship in *Doyle*, or that it implicates the "right and duty" of parents, codified by statute, "to provide for the care of [their] child." (*Doyle*, at p. 610, citing Civ. Code, former § 196, and Pen. Code, § 270; see Fam. Code, § 3900.) *Doyle* did not evaluate the meaning of a "health care decision" that could be made by an agent, surrogate, or conservator, absent such a special familial relationship. Nothing we say here addresses whether any particular familial relationship would itself convey authority to agree to arbitration with a skilled nursing facility.

negotiation, choosing a dispute resolution method does not similarly serve the purpose of making "health care decisions" when that choice is contained in a side agreement with no impact on health care or who administers it. The authority to make health care decisions—here, the authority to obtain skilled nursing care—could be "fully performed" without reference to that side agreement. (*Palomo v. State Bar, supra*, 36 Cal.3d at p. 794 & fn. 5.) And accepting or rejecting that side agreement could not be said to be "in pursuit of" (*Palomo*, at p. 794, fn. 5) or to "effectuate" (*Blum v. Robertson, supra*, 24 Cal. at p. 140) a health care decision. "The power" bestowed upon an agent "is to be construed with reference to the subject-matter, and all the words used in conferring it. . . ." (*Beckman v. Wilson* (1882) 61 Cal. 335, 336.) Thus, to the extent general agency principles might aid us here in divining the scope of a health care decision (see § 4688), we employ them consistently with what we have gleaned from examining the Health Care Decisions Law and Logan's power of attorney on this subject. We remain mindful that the Legislature, and in turn Logan, contemplated a "health care decision" would concern personal decisions such as provider and treatment selection.

Despite the different grants of authority at issue in *Madden* and in cases involving the Health Care Decisions Law, several Courts of Appeal have read *Madden* as supporting defendants' position that the power to make health care decisions, under the law and powers of attorney invoking it, does include the power to enter optional, separate arbitration agreements with health care providers. (*Garrison v. Superior Court, supra*, 132 Cal.

App.4th at p. 267; *Hogan v. Country Villa Health Services, supra*, 148 Cal.App.4th at p. 267.) But having reviewed the deep-seated agency principles governing implied powers under powers of attorney and the *Madden* decision, and having recognized the difference between the power to contract delegated in *Madden* and the power to make health care decisions delegated here, these Courts of Appeal appear to have taken *Madden* farther than it and the law of agency should go in this context.[13] (See *Logan*

13. *Garrison*, and *Hogan* after it, cite other provisions of the Health Care Decisions Law to support the result they reach, noting a "combined effect" with the implied agency principles of Civil Code section 2319. (*Garrison, supra*, 132 Cal.App.4th at pp. 265–267; *Hogan, supra*, 148 Cal.App.4th at pp. 265–267.) But those other provisions do not bear on whether an agreement to arbitrate is a health care decision. Probate Code section 4683, subdivision (a), merely states an agent for health care decisions may make them "to the same extent the principal could make" them. This offers no definition of the critical term. Subdivision (b) of that section allows an agent under a power of attorney for health care to make decisions "that may be effective after death." But this, too, offers no guidance. Arbitration is hardly best categorized as a decision effective after death. After all, an agent would typically agree to arbitrate health care disputes while the principal is still alive and in need of care, an arbitration over health care might well take place while the principal is still alive, and, as discussed (at p. 12, *ante*), under the Health Care Decisions Law, these postdeath decisions are categorized separately from health care decisions and are exemplified by approving organ donation, autopsies, disposition of remains, and records releases—not matters such as arbitration. Finally, Probate Code section 4684, in requiring an agent to "make . . . health care decision[s] in accordance with the principal's individual health care instructions" or known wishes, or otherwise, "in accordance with the agent's determination of the

v. Country Oaks Partners, LLC, supra, 82 Cal.App.5th at p. 373 ["The holding in *Madden* is inapplicable" as "[t]here is nothing . . . 'necessary or proper and usual' about signing an optional arbitration agreement 'for effecting the purpose of [the] agency,' i.e., placing [the principal] into a skilled nursing facility"]; cf. *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1129 [163 Cal. Rptr. 3d 704] ["to the extent" *Garrison* broadly interpreted "health care decision" as including an arbitration decision, "we disagree with its conclusion"].) We therefore cannot, and do not, equate all agreements between a patient and a health care facility, regardless of their circumstances and their relation to obtaining health care, with health care decisions.[14]

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principal's best interest," likewise does not resolve the matter. It states how health care decisions should be made, not what they encompass.

14. *Hogan, supra*, 148 Cal.App.4th at p. 267, is correct that Health and Safety Code section 1599.81, which prohibits arbitration agreements from being a precondition to facility admission, plainly contemplates that patients and long-term health care facilities will enter into arbitration agreements. (Cf. 42 C.F.R. § 483.70(n) (2023) [imposing a similar rule on facilities participating in Medicare and Medicaid].) Although section 1599.81 suggests the Legislature views arbitration agreements as permissible in this context, it does not suggest the Legislature viewed these arbitration agreements as health care decisions or as effectuating such decisions, especially when presented as unnecessary to a patient's admission. Nor does the statute tell us *who* the Legislature thought should have authority to agree to arbitration. The statute and related federal regulations show, if anything, a view of arbitration agreements as distinct from decisions critical to receiving health care.

Having considered the meaning of a "health care decision" within Logan's power of attorney, in light of the Health Care Decisions Law and the Probate Code, we conclude that the most reasonable construction of that term excludes the optional, separate arbitration agreement with defendants. Resort to agency law bolsters, rather than undermines, this conclusion.[15]

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15. In doing so, we align California with the published opinions of numerous other state courts that—after reviewing powers of attorney formed under state statutes akin to the Health Care Decisions Law—conclude an agreement to arbitrate, particularly when optional and separate, is not a health care decision within an agent's power. (*Coleman v. United Health Services of Georgia* (2018) 344 Ga.App. 682 [812 S.E.2d 24, 26]; *Parker v. Symphony of Evanston Healthcare, LLC* (2023) 2023 IL App (1st) 220391 [468 Ill.Dec. 147, 220 N.E.3d 455, 463]; *Ping v. Beverly Enterprises* (Ky. 2012) 376 S.W.3d 581, 592, 594; *Johnson v. Kindred Healthcare, Inc., supra*, 2 N.E.3d at pp. 851–859; *Dickerson v. Longoria* (2010) 414 Md. 419 [995 A.2d 721, 731, 736–739]; *Primmer v. Healthcare Industries Corp.* (Ct.App. 2015) 2015 Ohio 4104 [43 N.E.3d 788, 789, 795]; *Williams v. Smyrna Residential, LLC* (Tenn., Feb. 16, 2024, M2021-00927-SC-R11-CV) ___ S.E.2d ___ [2024 Tenn. Lexis 44, p. *18]; *Texas Cityview Care Center, L.P. v. Fryer* (Tex.Ct.App. 2007) 227 S.W.3d 345, 349, 352–353; *Miller v. Life Care Centers of America, Inc.* (2020) 2020 WY 155 [478 P.3d 164, 166–167, 172–173]; cf. *Koricic v. Beverly* (2009) 278 Neb. 713 [773 N.W.2d 145, 151] [agent with authority arising from practice of signing medical documents was not empowered to execute optional arbitration agreement]; *Arredondo v. SNH SE Ashley River Tenant, LLC* (2021) 433 S.C. 69 [856 S.E.2d 550, 557–558] [optional arbitration agreement was not "necessary" to making health care decisions]; *Lujan v. Life Care Centers of America* (Colo. Ct.App. 2009) 222 P.3d 970, 973 [statutory surrogate for health care decisions could not agree to optional arbitration]; *Blankfeld*

C. ***Kindred***

Defendants argue if we interpret, as we have, the term "health care decision" in Logan's power of attorney

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v. Richmond Health Care, Inc. (Fla.Dist.Ct.App. 2005) 902 So.2d 296 [same]; *Mississippi Care Center of Greenville, LLC v. Hinyub* (Miss. 2008) 975 So. 2d 211, 218 [same]; *Gayle v Regeis Care Center, LLC* (N.Y.App.Div. 2021) 191 A.D.3d 598, 599–600 [143 N.Y.S.3d 343] [same]; *State ex rel. AMFM, LLC v. King* (2013) 230 W.Va. 471 [740 S.E.2d 66, 72] [same].) One published opinion appears to take the opposite approach to powers of attorney and optional arbitration agreements. (*Moffett v. Life Care Centers of America* (Colo.Ct.App. 2008) 187 P.3d 1140, 1141–1142, 1147 [concluding the holder of a medical durable power of attorney may, in selecting a long-term health care facility, execute "applicable admissions forms" including an optional arbitration agreement, but also noting that holder had powers under a general power of attorney, and both powers of attorney, which were not in the record, would need to be reviewed on remand to see if they curtailed arbitration authority], affirmed on other ground in *Moffett v. Life Care Centers of America* (Colo. 2009) 219 P.3d 1068, 1071 [declining to reach "whether a person holding a medical durable power of attorney is authorized to sign an arbitration agreement on behalf of an incapacitated patient"].) A few others have reached a different result based on powers of attorney with broader or different language. (E.g., *Ingram v. Chateau* (Mo. 2019) 586 S.W.3d 772, 776 [because a voluntary arbitration agreement "was presented in connection with Ingram's admission to Brook Chateau, there was no reason for Hall to doubt she had the authority to sign it on Ingram's behalf as part of her express 'full authority'" under a power of attorney to "move" Ingram into a residential care facility].)

Ultimately, the majority view better aligns with Logan's power of attorney, the arbitration agreement here, and California's Health Care Decisions Law and its law of agency.

to exclude the decision to accept an optional, separate arbitration agreement, that decision would so disfavor arbitration as to violate the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) and, in particular, the high court's decision in *Kindred Nursing Centers L. P. v. Clark* (2017) 581 U.S. 246, 250 [197 L. Ed. 2d 806, 137 S. Ct. 1421] (*Kindred*). We disagree.

Congress enacted the FAA "in response to judicial hostility to arbitration. Section 2 of the statute, [by making] arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,'" establishes an "'an equal-treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."'" (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 649–650 [213 L. Ed. 2d 179, 142 S. Ct. 1906], quoting 9 U.S.C. § 2, and *Kindred, supra*, 581 U.S. at p. 251.) When the FAA applies—that is, when the contracting parties are sufficiently involved in interstate commerce (see *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265 [130 L. Ed. 2d 753, 115 S. Ct. 834])—the FAA "preempts any state rule discriminating on its face against arbitration" and "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." (*Kindred*, at p. 251.)

In *Kindred*, Kentucky's Supreme Court had invalidated two agent-signed arbitration agreements—

in one instance, where a power of attorney was plainly broad enough to give the agent the power to sign, and in another instance, where this was not so. (*Kindred, supra*, 581 U.S. at p. 250.) Regarding the broader power of attorney, the state court held "an agent could deprive her principal of an 'adjudication by judge or jury' only if the power of attorney 'expressly so provide[d],'" which it had not. (*Ibid.*) In so holding, the state court emphasized the "sacred," "inviolate" nature of the jury-trial right. (*Id.* at p. 252.) The high court held that the FAA preempted this "clear-statement rule." (*Kindred, supra*, 581 U.S. at pp. 251–254.) This rule, the high court reasoned, "hing[ed] on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." (*Id.* at p. 252.) The high court found it telling that no other Kentucky court had identified any other "'fundamental constitutional rights' held by a principal" that, to be waived, required an explicit grant of authority in a power of attorney. (*Id.* at p. 253.) As for the Kentucky Supreme Court's conjecture that its clear-statement rule might require a principal's explicit authorizations for an agent to intrude on certain other fundamental rights—such as by waiving a right to worship freely, or by arranging a principal's marriage or binding the principal to servitude—the high court called such examples "patently objectionable and utterly fanciful." (*Id.* at p. 253.) It concluded that placing the choice to arbitrate alongside these other decisions evidenced an impermissible "'hostility to arbitration'" because of its nature. (*Id.* at p. 254.) Accordingly, the high court reversed the Kentucky Supreme Court as to the broad power of attorney and ordered arbitration. Regarding

the narrower power of attorney, however, the high court remanded, reasoning that if the interpretation of the narrower power of attorney was "wholly independent of the . . . clear-statement rule, then nothing we have said disturbs it."[16] (*Kindred, supra*, 581 U.S. at p. 256.)

Assuming the FAA applies here, *Kindred* does not "disturb" our conclusions regarding the scope of a health care agent's powers. For instance, we have not revisited the holding in *Madden, supra*, 17 Cal.3d at page 706, that arbitration, if agreed to, is a "'proper and usual' means of resolving malpractice disputes." A principal or any properly authorized agent may, under *Madden*, agree to arbitration. What we conclude is that a "health care decision," under our Health Care Decisions Law and Logan's power of attorney for health care, excludes an optional, separate agreement that does not accomplish health care objectives. This outcome does not emerge from or reflect hostility towards arbitration. Nor does it depend on a clear-statement rule. Rather, it derives from the scope of the health care decisionmaking power Logan granted to Harrod—as determined from generally applicable legal principles—and the conclusion that agreeing to an optional, separate arbitration agreement with a skilled nursing facility is not a health care decision. (See *Garcia v. KND Development 52, LLC* (2020) 58 Cal.App.5th 736, 747 [272 Cal. Rptr. 3d 706] [discussing *Kindred's* inapplicability when court relied on "generally applicable

16. On remand, the Kentucky Supreme Court determined the clear-statement rule had played no role in its decision and left its previous decision, denying arbitration, in place. (*Kindred Nursing Centers L.P. v. Wellner* (Ky. 2017) 533 S.W.3d 189, 194.)

law"].) Logan himself could have agreed to arbitration, whether before or after any dispute arose. Likewise, any agent of Logan operating under a broader power of attorney, whether that power of attorney contained a clear statement of the power to agree to arbitration or utilized more general language encompassing that power, might have bound Logan to arbitrate. Logan's power of attorney here, however, did not make Harrod such an agent.

III. DISPOSITION

We affirm the judgment of the Court of Appeal.[17]

JENKINS, J.

We Concur:

GUERRERO, C. J.
CORRIGAN, J.
LIU, J.
KRUGER, J.
GROBAN, J.
EVANS, J.

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17. We disapprove *Garrison v. Superior Court, supra*, 132 Cal.App.4th 253 and *Hogan v. Country Villa Health Services, supra*, 148 Cal.App.4th 259 to the extent they are inconsistent with this opinion.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR, FILED AUGUST 18, 2022

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

B312967

(Los Angeles County Super. Ct. No. 20STCV26536)

CHARLES LOGAN,

Plaintiff and Respondent,

v.

COUNTRY OAKS PARTNERS, LLC, *et al.*,

Defendants and Appellants.

August 18, 2022, Opinion Filed

APPEAL from an order of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport; Sun Mar Management Services, Trent Evans and Kevin Khachatryan for Defendants and Appellants.

Lanzone Morgan, Ayman R. Mourad and Alexander S. Rynerson for Plaintiffs and Respondents.

Appendix B

INTRODUCTION

Plaintiff Charles Logan designated his nephew, Mark Harrod, as his health care agent and attorney-in-fact using an advance health care directive and power of attorney for health care decisions form developed by the California Medical Association (the Advance Directive). After the execution of the Advance Directive, Logan was admitted to a skilled nursing facility. Nineteen days later, Harrod executed an admission agreement and a separate arbitration agreement purportedly on Logan's behalf as his "Legal Representative/Agent."

The sole issue on appeal is whether Harrod was authorized to sign the arbitration agreement on Logan's behalf. The answer turns on whether an agent's authority to make "health care decisions" on a principal's behalf includes the authority to execute optional arbitration agreements. We conclude it does not. We therefore affirm the trial court's order denying the motion to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

In 2017, Logan executed the Advance Directive under Probate Code[1] sections 4600 through 4805 (Health Care Decisions Law), appointing Harrod as his health care agent. Under the Advance Directive, if Logan's primary physician found he could not make his own health care

1. All further undesignated statutory references are to the Probate Code.

decisions, Harrod had the "full power and authority to make those decisions for [Logan]," subject to any health care instructions set forth in the Advance Directive. In the Advance Directive, Logan specified that Harrod "will have the right to: [¶] A. Consent, refuse consent, or withdraw consent to any medical care or services, such as tests, drugs, surgery, or consultations for any physical or mental condition. This includes the provision, withholding or withdrawal of artificial nutrition and hydration (feeding by tube or vein) and all other forms of health care, including cardiopulmonary resuscitation (CPR). [¶] B. Choose or reject my physician, other health care professionals or health care facilities. [¶] C. Receive and consent to the release of medical information. [¶] D. Donate organs or tissues, authorize an autopsy and dispose of my body, unless I have said something different in a contract with a funeral home, in my will, or by some other written method." The Advance Directive does not specifically address Harrod's authority to execute an arbitration agreement on Logan's behalf.

On November 10, 2019, Logan was transferred from a hospital to Country Oaks Partners, LLC, doing business as Country Oaks Care Center (Country Oaks), a skilled nursing facility. Nineteen days later, on November 29, 2019, Harrod executed an admission agreement, and a separate arbitration agreement purportedly on Logan's behalf as his "Legal Representative/Agent." The arbitration agreement stated (in boldface): "Residents shall not be required to sign this Arbitration Agreement as a condition of admission to this facility or to continue to receive care at the facility."

Appendix B

On December 13, 2019, Logan was transferred from Country Oaks to another skilled nursing facility. Following his discharge from Country Oaks, Logan filed a complaint against Country Oaks and its owner and operator, Sun Mar Management Services, Inc., alleging causes of action for declaratory relief, elder abuse and neglect, negligence, and violation of Residents' Bill of Rights (Health & Saf. Code, § 1430, subd. (b)).[2]

Country Oaks filed a petition to compel arbitration. Following an initial hearing on the petition, the trial court continued the hearing to allow both parties to submit supplemental briefing on the issue of whether a health care agent may bind his principal to arbitration. After reviewing the supplemental briefs and hearing oral argument, the trial court denied the petition. The court concluded Country Oaks failed to meet its burden of proving the existence of a valid, enforceable arbitration agreement because Harrod lacked authority to enter into the agreement on Logan's behalf. It explained that although the Advance Directive was effective at the time Logan entered the facility,[3] the Advance Directive "only entitle[d] Harrod to make health care decisions for [Logan], not enter a binding arbitration agreement on his behalf."

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2. Logan also named Alessandra Hovey, the administrator of Country Oaks, as a defendant in the complaint. Logan dismissed Hovey from the action on December 17, 2020.

3. On appeal, neither party disputes the trial court's factual finding that the Advance Directive sprung into effect at the time Logan was admitted to Country Oaks (i.e., that Logan's primary physician found he could not make his own health care decisions).

Country Oaks timely appealed the order denying its petition.

DISCUSSION

A. Governing Law and Standard of Review

The Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) provides arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)[4] "'[E]ven when the [FAA] applies, [however], interpretation of the arbitration agreement is governed by state law principles. . . . Under California law, ordinary rules of contract interpretation apply to arbitration agreements. . . . "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. . . . '"" (*Valencia v. Smyth* (2010) 185 Cal. App.4th 153, 177 [110 Cal. Rptr. 3d 180].)

Although federal and California law favor enforcement of valid arbitration agreements, ""'[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.'" [Citation.]" (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701 [74 Cal. Rptr. 3d 210].) "The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement." (*Flores v. Evergreen at*

4. The arbitration agreement states: "The parties to this Arbitration Agreement acknowledge and agree that the Admission Agreement and this Arbitration Agreement evidence a transaction in interstate commerce governed by the [FAA]."

San Diego, LLC (2007) 148 Cal.App.4th 581, 586 [55 Cal. Rptr. 3d 823].)

The issue on appeal—i.e., did the Advance Directive confer authority on Harrod to enter into an arbitration agreement on Logan's behalf—presents a legal question. We therefore apply the de novo standard of review. (See *Lopez v. Bartlett Care Center, LLC* (2019) 39 Cal. App.5th 311, 317 [251 Cal. Rptr. 3d 813] [legal conclusions underlying a trial court's denial of a petition to compel arbitration are reviewed de novo].)

B. Harrod Lacked Authority To Bind Logan to Arbitration with Country Oaks

Country Oaks contends the Advance Directive granted Harrod actual authority to execute the arbitration agreement on Logan's behalf. Relying on *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 [33 Cal. Rptr. 3d 350] (*Garrison*), Country Oaks argues that because the Advance Directive expressly authorized Harrod to make health care decisions, including "choos[ing] . . . health care facilities," Harrod also was authorized to sign an optional arbitration agreement when admitting Logan to the nursing facility. We respectfully disagree with the reasoning set forth in *Garrison* and conclude the Advance Directive did not confer such broad authority on Harrod.

In *Garrison*, a daughter, who was designated as her mother's attorney-in-fact under a health care power of attorney, admitted her mother into a health care facility. (*Garrison, supra*, 132 Cal.App.4th at p. 256.) In doing

so, the daughter signed two arbitration agreements (one pertaining to medical malpractice claims and one pertaining to all other claims against the facility). (*Id.* at pp. 256, 259–261.) Following the death of her mother, the daughter and other family members sued the facility. (*Id.* at pp. 256–257.) The trial court granted the facility's motion to compel arbitration, and the Court of Appeal agreed that the daughter had authority to enter into the arbitration agreements on her mother's behalf. (*Id.* at pp. 262, 266.)

The health care power of attorney at issue in *Garrison* 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.) As discussed below, we are unpersuaded these provisions support that conclusion.

First, the *Garrison* court relied on section 4683, subdivisions (a) and (b), which provide, in relevant part: "An agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so" and "may also make decisions that may be effective after the principal's death." That an agent is permitted to make health care decisions to the same extent as the principal says nothing, however, about

the agent's authority to agree to enter into an arbitration agreement and thereby waive the principal's right to a jury trial. As defined in the Health Care Decisions Law, the provisions of which are specifically referenced in the Advance Directive, a "'health care decision'" is limited to "a decision made by a patient or the patient's agent . . . , regarding the patient's health care. . . ." (§ 4617.) "Health care," in turn, is defined as "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition." (§ 4615.) Thus, section 4683 merely confers upon the agent the authority to make decisions affecting the principal's "physical or mental health" to the same extent the principal could make those decisions. The decision to waive a jury trial and instead engage in binding arbitration does not fit within these definitions. It is not a health care decision. Rather it is a decision about how disputes over health care decisions will be resolved.

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.) Where, as here, neither the plain language of the Advance Directive nor any evidence in the record demonstrates Logan's wishes or personal values regarding arbitration, we fail

to see how section 4684 sheds light on whether the agent's execution of an arbitration agreement is a "health care decision."

Finally, the *Garrison* court cites 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.) It therefore turned to Civil Code section 2319: "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. . . ." Relying on our Supreme Court's decision in *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 [131 Cal. Rptr. 882, 552 P.2d 1178] (*Madden*), the *Garrison* court 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 facts in *Madden*, however, are distinguishable from both the facts in *Garrison* and this case.

In *Madden*, the defendants appealed from "an order denying enforcement of an arbitration provision in a medical services contract entered into between the Board of Administration of the State Employees Retirement System . . . and defendant Kaiser Foundation Health Plan." (*Madden, supra*, 17 Cal.3d at p. 702, fn. omitted.) Plaintiff, a state employee who enrolled under the Kaiser plan, contended she was not bound by the provision for arbitration. (*Ibid.*) Our Supreme Court held that Civil Code section 2319 granted the Board (as agent for the

employee) the authority to do whatever is "'proper and usual'" to carry out its agency, and therefore the Board "enjoyed an implied authority to agree to arbitration of malpractice claims of enrolled employees." (*Id.* at pp. 702–703.) Thus, based on *Madden*, when two parties "possessing parity of bargaining strength" (*id.* at p. 711) negotiate a group contract, it is "proper and usual" to negotiate provisions of the contract, which may include an arbitration provision. The holding in *Madden* is inapplicable here, however, where the skilled nursing facility's admission agreement does not contain an arbitration provision negotiated between parties of equal bargaining power. Rather, as required by California and federal law, Country Oaks presented Harrod with a separate document from the admission contract, which contained an optional arbitration agreement. (See Health & Saf. Code, § 1599.81, subds. (a) & (b) ["(a) All contracts of admission that contain an arbitration clause shall clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility. [¶] (b) All arbitration clauses shall be included on a form separate from the rest of the admission contract. . . ."]; see also 42 C.F.R. § 483.70(n)(1) (2019) ["The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility."].) There is nothing, therefore, "necessary or proper and usual" about signing an optional arbitration agreement

"for effecting the purpose of his agency," i.e., placing Logan into a skilled nursing facility. Rather, the "health care decision" (whether to consent to admission into the skilled nursing facility) has been expressly decoupled from the decision whether to enter into the optional arbitration agreement.

Based on the foregoing, we decline to follow *Garrison*'s broad interpretation of "health care decisions."[5] Rather, we begin our analysis by reviewing the plain language of the Advance Directive. (See *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1214 [128 Cal. Rptr. 2d 728] ["The scope of a power of attorney depends on the language of the instrument, which is strictly construed. [Citation.]"].) Logan stated in the Advance Directive: "If my primary physician finds that I cannot make my own health care decisions, I grant my agent full power and authority to make those decisions for me, subject to any health care instructions set forth below." That grant of authority is immediately followed by a list of four specific powers granted to Harrod, including the power to "[c]hoose or reject my physician, other health care professionals or health care facilities."

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5. We note *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 262 [55 Cal. Rptr. 3d 450] followed *Garrison*, opining *Garrison* was "well reasoned." In *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1129 [163 Cal. Rptr. 3d 704], however, the court in dicta disagreed with the *Garrison* court's conclusion that "the term 'health care decisions' made by an agent encompasses the execution of arbitration agreements on behalf of the patient."

Appendix B

The Advance Directive does not address arbitration agreements or the resolution of legal claims. Nor can we infer Harrod had authority to enter into an optional arbitration agreement from the fact he had express authority to make "health care decisions" and "[c]hoose . . . health care facilities." As discussed above, an agent's decision to sign an *optional* arbitration agreement with a skilled nursing facility is not a decision regarding the "patient's physical or mental condition." (§ 4615.)

Our conclusion that the execution of an arbitration agreement is not a "health care decision" finds further support in the regulatory history of the recently enacted federal regulatory scheme prohibiting nursing facilities participating in Medicare or Medicaid programs from requiring a resident (or his representative) to sign an arbitration agreement as a condition of admission. (42 C.F.R. § 483.70(n)(1) (2019).) Specifically, in the Centers for Medicare & Medicaid Services' (i.e., the agency's) responses to public comments published in the Federal Register, the agency explained: "[C]ommenters noted that the number of [nursing] facilities practically available to an individual may be extremely limited. For example, it is entirely reasonable for a resident to want to remain close to family and friends. However, many times there is only one nursing home within a reasonable geographic distance of the resident's family or friends. Likewise, factors such as the type of payment the facility will accept, the health care and services it offers, and the availability of beds limit an individual's choice of facilities. Therefore, many residents may only have a few, and perhaps only one or two, suitable facilities from which to choose. Once a facility is

selected, commenters stated that some residents believe they have no choice but to sign the [arbitration] agreement in order to obtain the care they need." (84 Fed.Reg. 34718, 34727–34728 (July 18, 2019).) The agency "agree[d] that many residents or their families usually do not have many [nursing] facilities to choose from and the existence of one of these agreements as a condition of admission is not likely to be a deciding factor in choosing a facility. We also agree that no one should have to choose between receiving care and signing an arbitration agreement. Therefore, we have finalized § 483.70(n)(1) to state that the facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility." (84 Fed.Reg. 34718, 34728 (July 18, 2019).) These comments and responses demonstrate that, practically speaking, arbitration agreements are not executed as part of the health care decisionmaking process, but rather are entered into only *after* the agent chooses a nursing facility based on the limited options available and other factors unrelated to arbitration (such as geographic distance from family members and type of payment the facility will accept).

Accordingly, for the reasons discussed above, we conclude the authority granted to Harrod in the Advance Directive to make health care decisions of behalf of Logan, including choosing a skilled nursing facility, does not extend to executing optional arbitration agreements. Because Harrod lacked authority to sign the arbitration agreement, the trial court properly denied Country Oaks' petition to compel arbitration.

Appendix B

DISPOSITION

The order is affirmed. Logan is awarded his costs on appeal.

CERTIFIED FOR PUBLICATION

CURREY, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.

APPENDIX C — MINUTE ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CIVIL DIVISION, FILED MARCH 4, 2021

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
CIVIL DIVISION
CENTRAL DISTRICT, STANLEY MOSK
COURTHOUSE, DEPARTMENT 71

20STCV26536

CHARLES LOGAN,

vs.

COUNTRY OAKS PARTNERS, LLC, *et al.*,

March 4, 2021 9:30 AM

Judge:
Honorable Monica Bachner

Judicial Assistant: A. Barton
Courtroom Assistant:
D. Major

CSR: Anita B. Alderson,
CSR #11843
(CourtConnect)
ERM: None
Deputy Sheriff: None

NATURE OF PROCEEDINGS:

Petition of Defendant, Oaks Partners, LLC, to Compel Arbitration

Case Management Conference

Appendix C

Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

Matter is called for hearing and argued.

The Court adopts its tentative ruling as its final order as follows:

Defendant Country Oaks Partners, LLC's petition to compel arbitration of Plaintiff Charles Logan's claims in this action, joined by Defendant Sun-Mar Management Services, is denied.

Defendant Allesandra Hovey's joinder in the petition to compel arbitration is moot.

Plaintiff's request for monetary sanctions is denied.

Defendant Country Oaks Partners, LLC dba Country Oaks Care Center ("Country Oaks" or "Defendant") petitions for an order compelling Plaintiff Charles Logan ("Plaintiff") to arbitrate all claims asserted in this case and staying the action pending completion of arbitration. (Notice of Petition, pgs. 1-2; C.C.P. §§1281.2 1281.4.) Defendant Sun-Mar Management Services ("Sun- Mar") and dismissed defendant Allesandra Hovey ("Hovey") filed a Notice of Joinder ("Joinder") in Country Oaks' petition to compel arbitration. In opposition, Plaintiff requests monetary sanctions against Country Oaks and Sun-Mar (collectively, "Defendants") pursuant to C.C.P. §128.5 in the amount of $2,260. (Opposition, pg. 11.)

The parties initially appeared for the hearing on the petition on February 16, 2021. The Court continued the hearing to March 4, 2021, and granted Defendant's request for supplemental briefing on the issue of whether a healthcare agent can bind a principal to a healthcare arbitration agreement pursuant to a healthcare power of attorney. The Court also permitted Plaintiff to file supplemental briefing in response to Defendant's supplemental briefing, and limited both filings to five pages. (2/16/21 Minute Order.)

BACKGROUND

Plaintiff filed her complaint the instant action on July 14, 2020 against Country Oaks, Sun-Mar, and Hovey alleging causes of action for declaratory relief, elder abuse and neglect, negligence, and violation of Residents' Bill of Rights relating to Plaintiff's treatment at Defendants' facility. On July 29, 2020, the Court granted the application of Plaintiff's nephew Mark Harrod ("Harrod") to become Plaintiff's guardian ad litem in the action. Country Oaks filed the instant petition to compel arbitration on August 21, 2020, with a hearing date originally set for April 2, 2021. On September 4, 2020, Plaintiff filed an opposition to the petition, and on November 17, 2020, the Court advanced the hearing on the petition to February 16, 2021. On November 23, 2020, Sun-Mar and Hovey filed their Joinder. On December 7, 2020, Plaintiff filed an opposition to the Sun-Mar and Hovey's joinder in the petition. On December 15, 2020, Plaintiff filed a Notice of Dismissal of Hovey from the entire complaint, without prejudice, and on December 17, 2020, the Court entered Hovey's dismissal.

In light of the Court's dismissal, Hovey's joinder in the petition to compel arbitration is moot.

Plaintiff's opposition to Sun-Mar's Joinder addresses the merits of the petition, not whether Sun-Mar is entitled to join in the petition filed by Country Oaks. Accordingly, Sun-Mar's joinder in the petition is granted.

Plaintiff argues the Court should not consider any evidence Defendants submit in reply. (Opposition, pgs. 9-10.) However, in light of the new arguments and issues raised in opposition, the Court considers Defendants' evidence in reply.

PETITION TO COMPEL ARBITRATION

In deciding a petition to compel arbitration, trial courts must first decide whether an enforceable arbitration agreement exists between the parties, and then determine the second gateway issue of whether the claims are covered within the scope of the agreement. (See Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 961.) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation] No jury trial is available for a petition to compel arbitration.

[Citation]" (Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972.) (See also Chiron Corp. v. Ortho Diagnostic Systems, Inc. (9th Cir. 2000) 207 F. 3d 1126, 1130 ("The court's role under the [FAA] is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. [Citations]"). The party opposing the petition to compel arbitration bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. (Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal.App.4th 1276, 1284.)

A. Arbitration Agreement

Defendants did not prove the existence of an arbitration agreement with Plaintiff. Defendants submitted evidence Plaintiff executed an Advance Health Care Directive Including Power of Attorney for Heath Care Decisions ("Directive") on July 26, 2017, naming Harrod as his designated healthcare agent. (Decl. of Khachatryan ¶1, Exh. A.) Plaintiff appointed Harrod as, "[his] agent to make health care decisions for [him]." (Decl. of Khachatryan ¶1, Exh. A, pg. 1.) In the section titled "Authority of Agent," the Directive sets forth that Harrod must make health care decisions for Plaintiff consistent with the instructions in the document and Plaintiff's known desires. It also provides that if Plaintiff's primary physician finds he cannot make his own health care decisions, Plaintiff grants Harrod full power and authority to make those decisions for him, subject to any health care instructions set forth in the Directive, including the right to: (1) consent, refuse consent, or withdraw consent

for medical care or services; (2) choose or reject his physician or health care facilities; (3) receive and consent to the release of medical information; (4) donate organs or tissues, authorize an autopsy and dispose of his body, unless Plaintiff has said something different in another written method. In addition, the Directive explicitly excludes Harrod's right to consent to committing Plaintiff to or placing him in a mental health treatment facility, to convulsive treatment, psychosurgery, sterilization, or abortion. (Decl. of Khachatryan ¶1, Exh. A, pg. 2.) Finally, the Directive revokes any prior "Power of Attorney for Health Care or Natural Death Act Declaration[s]." (Decl. of Khachatryan ¶1, Exh. A, pg. 3.) The Directive does not explicitly give Harrod full power of attorney and only entitles him to make health care decisions on Plaintiff's behalf.

In opposition, Plaintiff disputes the Directive had sprung into effect given it only empowered Harrod to make decisions "if Plaintiff's primary care physician finds [Plaintiff] cannot make his own health care decisions," and Defendants submitted no evidence suggesting Plaintiff's primary physician had made such a diagnosis. (Opposition, pgs. 5-6.) In reply, Defendants submitted evidence they argue establish the Directive had sprung into effect prior to the time he entered Defendants' facility given Plaintiff's primary caretaker and physicians determined Plaintiff did not have a "cognitive ability to understand/carry out instructions" due to his diagnosis of dementia. (Reply, pg. 3, Reply-Decl. of Khachatryan ¶1, Exhs. E, F, H.) Defendants also point to the fact Gary Sandhu, M.D. sought Harrod's informed consent on Plaintiff's

behalf as evidence the Directive had sprung into effect. (Reply, pg. 3, Exh. G.) Accordingly, the evidence suggests the Directive was effective at the time Plaintiff entered the facility; however, even if effective, the Directive only entitles Harrod to make health care decisions for Plaintiff, not enter a binding arbitration agreement on his behalf. (See Young v. Horizon West, Inc. (2013) 220 Cal.App.4th 1122, 1129 ("Young") ["Finally and most importantly, the [Power of Attorney] contains no terms authorizing the patient's agent to make any decisions other than 'health care decisions' for the patient. [The health care facility parties] strive to avoid the legal effect of this omission, again citing [Garrison v. Superior Court (2005) 132 Cal.App.4th 253 [("Garrison")]]. Garrison, however, is distinguishable for this reason as well. There the durable power of attorney included 'the power to sign "[a]ny necessary waiver or release from liability required by a hospital, or physician."' [(Id. at p. 259.)] The reviewing court did, however, express the view that the term 'health care decisions' made by an agent encompasses the execution of arbitration agreements on behalf of the patient. So broad an interpretation of 'health care decisions' seems unnecessary to the result in Garrison, and to the extent that the court intended such a general application, we disagree with its conclusion."].)

Defendants also submitted a declaration from their facility's admissions coordinator Sandra Alvarado ("Alvarado") in which she declared that on November 29, 2019, she explained the Arbitration Agreement to Harrod. (Decl. of Alvarado ¶1.) Alvarado declared Plaintiff was unable to sign himself and authorized his nephew Harrod

to sign the Arbitration Agreement on his behalf. (Decl. of Alvarado ¶6.) However, this form declaration does not refer to how Plaintiff authorized Harrod to sign the Arbitration Agreement on his behalf and whether the authorization was specifically given for the Agreement or pursuant to Harrod's general Directive authorization to make health care decisions on Plaintiff's behalf. In reply, Defendants argue Plaintiff granted Harrod decision-making authority orally to Alvarado. (Reply, pg. 5.) However, this argument cites to the Alvarado declaration, which makes no reference to Plaintiff orally representing to her that Harrod had authority to sign an arbitration agreement on his behalf. Rather, the declaration suggests Harrod had healthcare decision-making authority at the time he signed documents on Plaintiff's behalf for his entry into the facility.

Defendants submitted evidence Harrod signed an Arbitration Agreement with Country Oaks, on Plaintiff's behalf, on November 29, 2019. (Decl. of Alvarado ¶¶2, 6; Decl. of Khachatryan ¶2, Exh. B.) The Arbitration Agreement identifies Plaintiff as the "Resident" and Harrod as the "Legal Representative/Agent." The Arbitration Agreement specifically provides that by virtue of Plaintiff's consent, instruction, and/or durable power of attorney, Harrod certifies that he is authorized to act as Plaintiff's agent in executing and delivering of the Arbitration Agreement and that the Defendants' facility is relying on this representation. (Decl. of Khachatryan ¶2, Exh. B, pg. 3.) Accordingly, Defendants argue Harrod himself represented to Defendants he was authorized to sign the Arbitration Agreement on Plaintiff's behalf and

otherwise availed himself to such authority by regularly signing documents on Plaintiff's behalf as Plaintiff's responsible party. (Reply, pg. 5.) However, the inclusion of this term does not necessarily establish Harrod's authority to enter an arbitration agreement on Plaintiff's behalf, which is determined by Plaintiff's conduct. As discussed above, the Declaration of Alvarado does not sufficiently demonstrate Plaintiff's acquiescence to have Harrod sign the Arbitration Agreement on his behalf. (See Young v. Horizon West, Inc. (2013) 220 Cal.App.4th 1122, 1132 [daughter lacked ostensible agency to bind resident to arbitrate claims against nursing facility though daughter represented holding such authority during admissions because ostensible authority was not expressed by the resident]; Valentine v. Plum Healthcare Group, LLC (2019) 37 Cal.App.5th 1076, 1089-1090 [husband did not bind wife to arbitration with skilled nursing facility despite participating in her care, because he was not designated as her agent, and no conduct by wife established ostensible agency].)

In supplemental briefing, Country Oaks argues the California Probate Code and agency law grant unlimited-scope healthcare agents authority to effectuate the purposes of the healthcare agency, which includes signing arbitration agreements on behalf of their principals, and the Directive did not limit Harrod's authority. (Supp-Brief, pg. 2.) However, as discussed above, the evidence does not suggest Harrod was an "unlimited-scope healthcare agent," rather, Harrod was appointed as Plaintiff's agent to make health care decisions for him, limited to the four enumerated types of health care decisions. Country

Oaks argues Harrod made a health care decision when he signed the Arbitration Agreement on Plaintiff's behalf because in signing the agreement, Harrod was making the decision to admit Plaintiff to the facility. (Supp-Briefing, pgs. 3-4.) Specifically, Country Oaks relies on Hutcheson v. Eskaton FountainWood Lodge (2017) 17 Cal.App.5th 937 ("Hutcheson"), in which the Court of Appeal analyzed the Legislature's intent for adopting the Healthcare Decisions Law ("HCDL") and concluded that admission of a resident to a nursing home along with the resident's sister's execution of an arbitration agreement was a "health care decision" under the HCDL and therefore fell outside the personal care power of attorney, which did not authorize the sister to make such health care decisions. (Hutcheson, at 957.)

However, Hutcheson does not address whether a plaintiff's health care power of attorney has authority to enter an arbitration agreement on a plaintiff's behalf, the Court of Appeal only concluded the decision amounted to a health care decision, and as such, did not fall within the plaintiff's sister's authority as a personal care power of attorney. Moreover, Hutcheson is distinguishable from the instant action given the decision to admit Plaintiff to the Country Oaks facility was made nineteen days prior to Harrod's execution of the arbitration agreement. (Supp- Opp, pg. 6.) As such, to the extent Harrod had authority to admit Plaintiff to the facility based on powers conferred him by the Directive, Country Oaks has not established Harrod also had authority to enter the Arbitration Agreement, which was not incidentally necessary to admitting Plaintiff to the facility and was not completed "as part

of the admission process" to Defendant's facility. (See Hutcheson, at 951, fn. 7 ["The parties also cite us to cases that dispute whether the authority to make a health care decision under a health care POA includes the authority to execute arbitration agreements. In [Hogan v. Country Villa Health Services (2007) 148 Cal.App.4th 259, 267-268 ("Hogan")] and [Garrison], the courts held the decision to admit someone to a particular care facility is a health care decision, and the execution of arbitration agreements as part of the admission process is part of the health care decisionmaking process. However, in [Young], the court, without expressly stating whether a decision to admit someone to a care facility is a health care decision, ruled in dicta that the authority to make health care decisions under a health care POA did not include the authority to execute an arbitration agreement unless expressly granted in the health care POA."].)

Country Oaks notes Hutcheson cites to Garrison, which held that an unrestricted durable power of attorney allowed an agent to bind her principal to arbitration. (Supp-Briefing, pg. 4.) However, as discussed above, the Directive in the instant action did not constitute an unlimited or unrestricted power of attorney.

Country Oaks also cites to Hogan, in which the Court of Appeal found the trial court erred in disregarding Garrison in denying the motion to compel arbitration. (Supp-Brief, pgs. 4-5.) Specifically, the in Hogan, the Court of Appeal held that the plaintiff's designation of her daughter in durable power of attorney for health care authorized daughter to enter into binding arbitration agreement

on her behalf. The Court noted the Probate Code §4701 Health Care Power of attorney authorized the plaintiff's daughter to make health care decisions for her, including the selection of health care providers, and impliedly included the power to execute contracts of admission when admitting plaintiff to a long-term health care facility, and given the plaintiff had not elected to restrict the powers of the daughter as her agent so as to exclude the power to enter into arbitration agreements, the daughter had the power to execute arbitration agreements when presented to her by the long-term health care facility as part of the package of admissions documents. (Hogan, at 262.) However, as argued in supplemental opposition, given Plaintiff was admitted to Defendants' facility nineteen days prior to the execution of the arbitration agreement, Harrod's decision to sign the arbitration agreement on Plaintiff's behalf does not fall within his decision to select and admit Plaintiff to Defendants' facility, unlike in Hogan, where the documents were executed at admission. (Supp-Opposition, pg. 6.) Here, that the authority only extended to the documents necessary to admit Logan is consistent with the regulatory scheme that admissions decisions are made separately from arbitration decisions. (See Code of Federal Regulations, title 42, § 483.70(n)(1) ["The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission…; Flores v. Evergreen at San Diego, LLC (2007) 148 Ca. App. 4th 581, 585 ["If the facility requests that the patient agree to arbitration, this provision cannot be included in the standard admission agreement. Instead, it must be set forth in a separate document with a separate signature line. ([Health & Saf. Code] § 1599.81, subd. (b).)"].)

Defendants failed to establish, by a preponderance of the evidence, the existence of a valid, enforceable arbitration agreement between the parties.

Based on the foregoing, Defendants' petition to compel arbitration is denied.

REQUEST FOR MONETARY SANCTIONS

Plaintiff requests an award of monetary sanctions against Defendants pursuant to C.C.P. §128.5(a) on the grounds the instant petition to compel arbitration is without merit, lacking any underlying bases in fact or law. (Opposition, pgs. 10-11.)

C.C.P. §128.5(a) provides as follows: "A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."

"'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. The mere filing of a complaint without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section." (C.C.P. §128.5(b)(1).)

"'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party."

C.C.P. §128.5(b)(2). "[A] suit indisputably has no merit only 'where any reasonable attorney would agree that the action is totally and completely without merit.'" (Finnie v. Town of Tiburon (1988) 199 Cal.App.3d 1, 12 (Citations Omitted).)

The Court finds sanctions are not warranted. Defendants did not engage in "actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay" by filing the instant petition. (C.C.P. §128.5(a).) Defendants petition and reply set forth grounds for bringing the instant petition, notwithstanding the Court's finding Defendants failed to establish the existence of a binding arbitration agreement between Plaintiff and Defendants. As such, the Court finds Defendant's bringing of the instant petition was not frivolous or in bad faith to warrant sanctions.

Based on the foregoing, Plaintiff's request for monetary sanctions is denied.

The Court's written Ruling is signed and filed this date.

Case management conference is held.

Jury Trial is scheduled for 05/09/2022 at 10:00 AM in Department 71 at Stanley Mosk Courthouse. Trial is estimated for

Final Status Conference is scheduled for 04/29/2022 at 10:00 AM in Department 71 at Stanley Mosk Courthouse.

Appendix C

Post-Mediation Status Conference is scheduled for 01/18/2022 at 08:30 AM in Department 71 at Stanley Mosk Courthouse.

The parties are ordered to comply with the Court's Trial Preparation Order.

Notice is waived.