No. 23-1357

IN THE

Supreme Court of the United States

COUNTRY OAKS PARTNERS, LLC,
DBA COUNTRY OAKS CARE CENTER, *et al.*,

Petitioners,

v.

MARK HARROD,

Respondent.

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

BRIEF OF *AMICI CURIAE* ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA AND ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, health care facilities, schools and municipalities and other public entities. Members have a strong interest in and extensive experience with civil matters generally, including arbitration.

The Association of Southern California Defense Counsel ("ASCDC") is a voluntary membership association comprised of more than 1,000 attorney-members, among whom are some of the leading trial lawyers of California's civil defense bar. ASCDC's members primarily represent parties involved in legal disputes from the business community, professionals, including attorneys, accountants and financial professionals, health care providers, religious, and civic institutions who provide the goods and services vital to our nation's economic health and growth. Founded in 1959, the Association is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice in this state.

Although ASCDC and ADC-NCN are separate organizations, they have some common members and

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1. No party or counsel for a party authored or made a monetary contribution to fund this brief. Rule 37.6. The authors of this brief provided notice to counsel for all parties on July 19, 2024 of their intention to file this brief. Rule 37.2.

coordinate from time to time on matters of shared interest, such as this amicus brief. Together and separately, they have appeared as amicus curiae in many cases before in both state and federal appellate courts to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations.

SUMMARY OF ARGUMENT

In cases governed by the Federal Arbitration Act ("FAA"), does broad general authority to make arrangements for health care on behalf of the principal include authority to enter into agreements to arbitrate disputes concerning that care?

As this Court has held, agreements to arbitrate should not be subject to restrictions not applicable to non-arbitration agreements—even in a health care setting. Yet the California Supreme Court's decision in this case, *Harrod v. Country Oaks Partners, LLC*, 15 Cal. 5th 939 (2024) ("*Harrod*"), ruled that an agent did not have the authority to agree to arbitration because the advance care directive did not specifically mention the power to decide about arbitration. In *Kindred Nursing Centers Ltd. v. Clark*, 581 U.S. 246, 137 S.Ct. 1421, 1424-1425, 197 L.Ed.2d 806 (2017) ("*Kindred*"), this Court rejected Kentucky's adoption of such a "clear-statement rule," holding that an arbitration agreement signed by an agent pursuant to an advance directive-power of attorney cannot be singled out for this kind of "disfavored treatment." *Id*. at 248, 252. The power of attorney need not specifically authorize each act the agent undertakes—such as agreeing to arbitrate disputes—so long as the agent's acts are carried out to

accomplish the purposes of the directive; e.g., contracting with a health facility in providing for the principal's medical care.

An "advance directive" or other instrument appointing an agent to arrange for health care services necessarily encompasses authority to enforce the terms for providing those services. And authority over enforcement must include authority to select the means of enforcement.

The California Supreme Court's decision in *Harrod* singled out dispute resolution through arbitration as one term a health care agent may not include in a contract on behalf of the principal. That is contrary to this Court's decision in *Kindred* and preempted when applied to "disfavor" contracts, like the ones here, governed by the FAA. What's more, *Harrod* effectively removes arbitration from potential mechanisms of dispute resolution for persons with an agent for health care decisions. *Id.* at 946-947. This Court should grant certiorari and resolve this issue of importance to millions of Americans.

ARGUMENT: WHY THE PETITION FOR CERTIORARI SHOULD BE GRANTED

The FAA requires courts to place arbitration agreements "on equal footing with all other contracts." *Kindred*, 581 U.S. at 428, 137 S.Ct. at 1424-1425, quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2005); see 9 U.S.C. § 2.

This Court has previously ruled on the scope of an agent's authority under an advance medical directive.

In *Kindred*, the Kentucky Supreme Court had declined to give effect to two arbitration agreements executed by individuals holding "powers of attorney"—that is, authorizations to act on behalf of others to provide for their health care needs. *Kindred*, 581 U.S. at 428, 137 S.Ct at 1425. According to the Kentucky court, "a general grant of power (even if seemingly comprehensive) does not permit a legal representative to enter into an arbitration agreement for someone else; to form such a contract, the representative must possess *specific authority* to *waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury*." *Id.*, italics added.

This is known as the "clear-statement rule." Because the rule "singles out arbitration agreements for disfavored treatment," this Court granted certiorari and ultimately held that Kentucky's clear-statement rule violated the FAA. *Kindred*, 581 U.S. at 248, 137 S.Ct. at 1424-1425.

As this Court explained:

> The Kentucky Supreme Court's clear-statement rule, in just that way, fails to put arbitration agreements on an equal plane with other contracts. By the court's own account, that rule (like the one *Concepcion*[2] posited) serves to safeguard a person's "right to access the courts and to trial by jury." 478 S.W.3d at 327. . . . In ringing terms, the court affirmed the jury right's unsurpassed standing in the State Constitution: The framers, the court

2. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341-342, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (*Concepcion*).

> explained, recognized "that right and that right alone as a divine God-given right" when they made it "the *only* thing" that must be "'held sacred'" and "'inviolate.'" 478 S.W.3d, at 328-329 (quoting Ky. Const. §7).[3] So it was that the court required an explicit statement before an attorney-in-fact, even if possessing broad delegated powers, could relinquish that right on another's behalf. See 478 S.W.3d, at 331 ("We say only that an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal"). And so it was that the court did exactly what *Concepcion* barred [see 563 U.S. at 341-342]: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial. . . . *Such a rule is too tailor-made to arbitration agreements*—subjecting them, by virtue of their defining trait, to uncommon barriers—*to survive the FAA's edict against singling out those contracts for disfavored treatment.*

Kindred, 581 U.S. at 252, 137 S.Ct. at 1426-1427 (italics and bracketed citations and footnotes added).

The *Harrod* opinion likewise violates the "edict" of the FAA. *Harrod* follows the same flawed line of reasoning

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3. Article I, section 16 of the California Constitution similarly provides for an "inviolate" right to a "trial by jury," except to the extent that such right may be waived by legislatively-approved means—including arbitration.

as the Kentucky court in rejecting the agent's power to enter into an arbitration agreement under his power of attorney. "Under California's Health Care Decisions Law (Prob. Code, § 4600 et seq.), a principal may appoint a health care agent to make health care decisions should the principal later lack capacity to make them," such that an agent had authority to sign a contract for admission of principal to a skilled nursing facility. *Harrod, supra*, at 946. But that same agent was ruled without authority to simultaneously sign an agreement making "arbitration the exclusive pathway for resolving disputes with the facility," with the California Supreme Court reasoning that the "second contract was optional and had no bearing on whether the principal could access the facility or receive care." *Id*. at 946-947, *see also* 952-953, 962.

Inconsistent with *Kindred*, and disconnected to California's own statutes regarding scope of authority vested in an agent by power of attorney, *Harrod* holds that while the agent's decision to contract with a skilled nursing facility to provide services to the principal is a "health care decision," the optional agreement to arbitrate disputes relating to those very same health care services is not. *Harrod* at 960-964.

On the contrary, both admission and arbitration are among the "proper and usual" legal agreements within the scope of the agent's powers, because both relate to the subject matter of "health care decisions" that the agent was appointed to make for a principal who is unable to act for himself. Indeed, contrary to *Harrod*'s analysis, California otherwise explicitly recognizes in numerous contexts that an "agent" acting under a power of attorney may sign arbitration agreements waiving the principal's

right to a court or jury trial. E.g., Cal. Prob. Code, § 4450.

In spite of those factors, *Harrod* invokes essentially the same "clear-statement rule" that *Kindred* held was preempted under the FAA, by impermissibly "disfavoring" arbitration in the course of procuring medical services negotiated by someone who was expressly appointed to act on the dependent patient's behalf. No more "specific authority" to sign an arbitration agreement is required for an agent acting within the scope of the advance directive. *Kindred*, 581 U.S. at 248-252, 137 S.Ct. at 1425-1428. Yet *Harrod* refused to order arbitration because there was "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' . . . from agreements about who provides medical care or what care they provide." Petition p. a12-a13.[4]

The preemption doctrine applies in this context whether the "clear-statement rule" that ostensibly impairs the agent's ability to negotiate an agreement to arbitrate is adopted by a statutory enactment, by executive regulation, or by a judge-made rule. See *Chamber of Commerce of the United States v. Bonta*, 62 F.4th 473, 486 (9th Cir. 2023) (California's AB 51 preempted because it "disfavors the formation of agreements that have the essential terms

4. As Justice Kagan goes on to write: "Making matters worse, the Kentucky Supreme Court's clear-statement rule appears not to apply to other kinds of agreements [made by agents] relinquishing the right to go to court or obtain a jury trial." *Kindred*, 581 U.S. at 252, 137 S.Ct. at 1427, fn. 1. So does the clear-statement rule employed by *Harrod*, which would improperly proscribe an agent's agreement to arbitrate with health care facilities.

of an arbitration agreement"); *Valley View Health Care, Inc. v. Chapman* (E.D. Cal. 2014) 992 F.Supp.2d 1016, 1040 (California laws and regulations prohibiting "arbitration" of Patient's Bill of Rights claims under the Health & Safety Code permanently enjoined by virtue of FAA preemption); *Kindred*, 581 U.S. at 248, 252, 137 S.Ct. at 1425, 1426-1428 (judicial rule requiring a "clear-statement" of agent's authority to waive the principal's "sacred right" to a trial by jury was preempted).

Upon admission to a skilled nursing facility, either the principal (here Mr. Logan) or his agent (Mr. Harrod) is separately presented with an agreement that provides for the option to arbitrate disputes arising from the medical care provided—in lieu of litigation—in precisely the same fashion as mandated by California statute. *Harrod* disregards that whether the agreement providing for arbitration is signed by the patient or by his proxy under an Advance Directive, the identical process upon admission is evenhandedly followed. This is the same scenario contemplated by California's Probate Code, which expressly authorizes the agent to 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." Cal. Prob. Code, § 4683.

In light of the power explicitly granted to make such decisions under the "Health Care Decisions Law," to say that the agent has *less* power to agree to arbitrate health care disputes unquestionably "disfavors" arbitration contracts entered into by an agent.

Indeed, if *Harrod's* "clear-statement rule" were a legislative enactment that otherwise attempted to limit an agent's authority to arbitrate disputes under the Advance

Directive, that would likewise run afoul of the FAA. *Kindred*, 581 U.S. at 252, 137 S.Ct. at 1426-1427; see *Valley View Health Care, Inc. v. Chapman*, 992 F.Supp.2d 1016 1040-1044, 1050 (E.D. Cal. 2014) (the FAA preempts, and California was permanently enjoined from enforcing, any "ban" on agreements to arbitrate claims against health care facilities under Cal. Health & Saf. Code § 1599.81(d) and 22 CCR § 72516(d)).

Whether the agent's power to agree to arbitrate disputes after the patient's admission to a nursing home is ostensibly being limited by a statute or a judicially crafted "clear-statement" rule, the rationale offered by *Harrod* presents an obstacle which impermissibly disfavors arbitration that cannot be squared with the Supreme Court's FAA preemption jurisprudence. *Kindred*, 581 U.S. at 252, 137 S. Ct. at 1426-1427; *Concepcion*, 563 U.S. at 341-342: see also *Bonta*, 62 F.4th at 484-486, discussing *Kindred*.

The *Harrod* California Supreme Court drew a narrow and unjustified distinction: while the agent clearly had "the authority to select health care providers . . . institutions" and procedures, that authority did not "include the power to enter optional, separate dispute resolution agreements." *Harrod*, 15 Cal. 5th at 952. That the agreement was "separate" or "standalone" should not affect the determination of whether it is within the scope of the agent's reasonable authority. Particularly where, as here, the facility may not condition admission on an agreement to arbitrate. 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").

Statistically, admissions to health care facilities for a substantial percentage of elder patients are handled by "proxy" under some form of advance directive owing to the patient's incapacity. Given our fast-aging population, that number will only continue to grow. If *Harrod* stands, there are likely to be thousands of contracts made on a daily basis with health care providers in which no one—not the patient, not a family member nor an appointed agent—would have legal capacity to consent to arbitration.

CONCLUSION

The Court should grant the petition for certiorari to resolve the conflict with *Kindred*, to effect the reasonable expectations of patients and their health care agents, and to protect the laudable FAA goal of placing arbitration agreements "on equal footing with all other contracts." *Kindred*, 581 U.S. at 428.

Respectfully submitted,

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