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 THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, THE AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL CENTER FOR ASSISTED LIVING, AND THE CALIFORNIA ASSOCIATION OF HEALTH FACILITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

MARK E. REAGAN
HOOPER, LUNDY & BOOKMAN, P.C.
44 Montgomery St.,
Ste. 3500
San Francisco, CA 94104

Counsel for The American Healthcare Association and the National Center for Assisted Living, and The California Association of Health Facilities

CALVIN HOUSE
Counsel of Record
GUTIERREZ, PRECIADO & HOUSE, LLP
3020 E. Colorado Blvd.
Pasadena, CA 91107
(626) 449-2300
calvin.house@gphlawyers.com

Counsel for Amici Curiae

July 29, 2024

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COUNSEL PRESS
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INTEREST OF *AMICI CURIAE*[1]

The Civil Justice Association of California ("CJAC") is a nonprofit organization whose members are businesses from a broad cross section of industries. CJAC's principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some causes harm to others—more fair, certain, and economical. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern the scope and application of the Federal Arbitration Act ("FAA").

The American Health Care Association and the National Center for Assisted Living ("AHCA/NCAL") is the largest association in the United States representing long term and post-acute care providers, with more than 14,000 member facilities. AHCA/NCAL's diverse membership includes nonprofit and proprietary skilled nursing centers, assisted living communities, sub-acute centers, and homes for individuals with intellectual and development disabilities. By delivering solutions for quality care, AHCA/NCAL aims to improve the lives of the millions of frail elderly and individuals with disabilities who receive long term or post-acute care in our member facilities each day. AHCA/NCAL files amicus curiae briefs in cases, like this one, that have important implications for long term and post-acute care.

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1. Counsel of record for the parties received notice of the intent to file this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the *amici* made a monetary contribution to the preparation or submission of this brief.

The California Association of Health Facilities ("CAHF") is a nonprofit trade association representing more than 1,300 licensed skilled nursing, intermediate care, ICF-DD, ICF-MR, and subacute facilities in the State of California. The long-term care facilities represented by CAHF have been and continue to be subject to a multitude of lawsuits like the present action and will be directly impacted by this decision and its impact of the enforceability of pre-dispute binding arbitration agreements. CAHF provides a statewide, policy perspective to this case and issues regarding arbitration on behalf of the long-term care facilities in California.

CJAC, AHCA/NCAL and CAHF members have an interest in making sure that they can enforce their arbitration agreements despite the hostility toward such agreements that the decision that is the subject of the certiorari petition embodies.

SUMMARY OF THE ARGUMENT

The ongoing hostility toward arbitration exhibited by the California legislature and the California courts has led to yet another intrusion on the principles underlying the Federal Arbitration Act (FAA). Here, the California Supreme Court has applied a statute that discriminates against arbitration agreements on its face to frustrate the clear intent of the parties to settle their disputes by way of arbitration. The California Health and Safety Code requires (1) that any contract of admission to intermediate care and nursing facilities "clearly indicate" that agreement to arbitration is not a precondition to admission, (2) that any arbitration clause must be stated

on a separate form, and (3) that the arbitration clause notify the patient that he may *not* waive his ability to sue for violation of the Patient's Bill of Rights.[2] This Court should grant certiorari to make two points clear:

1. The hostility to arbitration expressed in the Health and Safety Code violates the superseding policy of the FAA to *favor* arbitration.

2. Reliance on the Health and Safety Code's mandated separation of an arbitration clause from the rest of the contract of admission to invalidate the arbitration clause on the grounds that a patient's power of attorney did not clearly state that his family member had authority to agree to an arbitration clause violates this Court's ruling that decisions that "specially impede[ ] the ability of attorneys-in-fact to enter into arbitration agreements. . . . flout[ ] the FAA's command to place those agreements on an equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 255-56 (2017).

ARGUMENT

California Health and Safety Code section 1599.61 requires intermediate care and nursing facilities to use a standard admission agreement. If a facility asks the patient to agree to arbitration, the arbitration provision

2. The Patient's Bill of Rights provides that "An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive that resident's or patient's rights to sue pursuant to this subdivision is void as contrary to public policy." Cal. Health & Safety Code § 1430.

cannot be included in the standard admission agreement but must be set forth in a separate document with a separate signature line. Cal. Health & Safety Code § 1599.81(b).

The California Supreme Court's decision acknowledged the effect of that statutorily mandated separation on its framing of the issue before it:

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

Harrod v. Country Oaks Partners, LLC, 15 Cal. 5th 939, 946-47 (2024).

I. The Court should grant certiorari to make clear that California's continuing hostility to arbitration violates the FAA's federal policy favoring arbitration.

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). To further that policy, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Ibid.* The FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

As this Court is aware, California's legislature and its courts have tried to evade that policy repeatedly. *See Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984) (statute that purported to invalidate certain arbitration agreements violated the Supremacy Clause); *Perry v. Thomas*, *supra* (FAA preempted a provision that actions for collection of wages could be maintained without regard to the existence of an arbitration agreement); *Preston v. Ferrer*, 552 U.S. 346 (2008) (statute requiring some wage and hour disputes to be determined by a state administrative agency conflicted with the FAA); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (California rule that a contractual arbitration provision was unconscionable because it disallowed class wide proceedings was preempted); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) (California courts could not use a contractual choice of California law to overcome this

Court's invalidation of a California rule that was hostile to arbitration).

More recently, in 2019, California enacted California Labor Code section 432.6, which makes it a crime for an employer to require its employees to agree to arbitration. Although the authors of the statute apparently thought they could avoid the FAA by stating that an arbitration agreement that violated the statute was still valid, the Ninth Circuit ruled otherwise:

> First, California argues that because AB 51 regulates the conduct of employers before an arbitration agreement is formed, rather than affecting the validity or enforceability of the executed arbitration agreement itself, it does not conflict with the FAA. As we have explained, this argument fails. Rules that impede parties' ability to form arbitration agreements hinder the broad "national policy favoring arbitration," *Buckeye Check Cashing*[*, Inc. v. Cardegna*], 546 U.S. [440,] at 443 [2006], just as much as those that undermine the enforceability of already-existing arbitration agreements.

Chamber of Commerce of the United States v. Bonta, 62 F.4th 473, 487 (9th Cir. 2023).

The California Supreme Court decision for which review is sought relies on statutory provisions that illustrate that ongoing hostility. Health and Safety Code section 1599.81 requires arbitration clauses, unlike other clauses, to be set forth in a separately signed document. Health and Safety Code section 1430 invalidates any

provision that would require arbitration of a claim under the Patient's Bill of Rights. Those statutes are facial violations of the FAA, as one United States District Court in California has recognized. *See Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1041 (E.D. Cal. 2014). Yet, the California Supreme Court's decision did not even acknowledge that it was basing its decision in part on statutes that clearly violate federal law.

II. The Court should grant certiorari to make clear that state courts may not evade the federal policy favoring arbitration by relying on contract interpretation rules that disfavor arbitration.

Although the California Supreme Court purported to base its decision solely on the language of the power of attorney under which Mark Harrod acted on behalf of his uncle, there is no doubt that California's anti-arbitration statutes informed its interpretation. Its decision hinged on the interpretation of the term "health care decisions" in the power of attorney. But California Probate Code section 4700 "instructs" that the Probate Code definition of that term governs the effect of the use of that term in any health care directive; its provisions "govern the effect" of writings created under its authority. 15 Cal. 5th at 950.

The California Supreme Court also relied on the fact that the arbitration clause appeared in a separate document.

> A standalone arbitration agreement would be "markedly dissimilar" [citation omitted] 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" [citation omitted] 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.

15 Cal. 5th at 952-53. In so doing, it seems to have ignored the fact that there was a standalone arbitration agreement *only because* the anti-arbitration provision in Health and Safety Code section 1599.81 required it. If Country Oaks could have included an arbitration clause in its standard admission agreement, the clause would have been enforceable as part of a health care decision to admit Mr. Harrod's uncle to the County Oaks facility. It was only because California decoupled arbitration from admission that the California Supreme Court could rule that the authority to enter into an arbitration agreement needed to be clearly stated in the power of attorney.[3]

Hence, when properly understood, the California Supreme Court's decision in this case is like the Kentucky Supreme Court's decision that this Court reversed in *Kindred Nursing Ctrs.*, *supra*. The Kentucky Supreme Court had ruled that "a general grant of power (even if seemingly comprehensive) does not permit a legal

3. The federal regulation that the California Supreme Court mentioned in passing as one of the bases for requiring an arbitration agreement to be in a separate signed document (15 Cal. 5th at 948) does not in fact contain that requirement. It states only that a facility cannot require arbitration as a condition of admission, and that the agreement to arbitrate must contain certain provisions. *See* 42 C.F.R. § 483.70(m).

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.'" 581 U.S. at 248. This Court ruled that the decision "single[d] out arbitration agreements for disfavored treatment," and therefore "violate[d] the FAA." 581 U.S. at 248. Likewise, here, the statutory requirement of a standalone arbitration agreement planted the seed for the California Supreme Court to treat an agreement to arbitrate with an intermediate care or nursing facility differently.

CONCLUSION

This case is emblematic of the continuing hostility that California's legislature and its courts have shown toward arbitration. The Court should grant certiorari to make clear that California, like the other states of the United States, must respect the strong federal policy in favor of arbitration. Under that policy the parties to an arbitration agreement may determine without coercion "the issues subject to arbitration" and "the rules by which they will arbitrate." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019).

Respectfully submitted,

MARK E. REAGAN
HOOPER, LUNDY & BOOKMAN, P.C.
44 Montgomery St.,
Ste. 3500
San Francisco, CA 94104

Counsel for The American Healthcare Association and the National Center for Assisted Living, and The California Association of Health Facilities

CALVIN HOUSE
Counsel of Record
GUTIERREZ, PRECIADO & HOUSE, LLP
3020 E. Colorado Blvd.
Pasadena, CA 91107
(626) 449-2300
calvin.house@gphlawyers.com

Counsel for Amici Curiae

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