No. 12-1012

IN THE

Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
d/b/a ODIN HEALTHCARE CENTER,
Petitioner,

v.

SUE CARTER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF JOYCE GOTT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE AMERICAN HEALTH CARE ASSOCIATION, THE ILLINOIS HEALTH CARE ASSOCIATION AND THE ILLINOIS COUNCIL ON LONG TERM CARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, preempts a state rule of law treating arbitration agreements signed by decedents differently than other contracts signed by decedents.

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae represent organizations whose members share a keen interest in a robust, well-

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice of the *amici curiae*'s intention to file this brief at least ten days prior to its due date. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members or their counsel made a monetary contribution to its preparation or submission.

functioning system of arbitration in the United States. Many of *amici*'s members employ arbitration agreements in contracts with their patients, residents and clients. Unless corrected, the lower court's decision creates a categorical rule carving out certain claims from these agreements and guarantees piecemeal litigation, split across multiple forums, over the same set of facts. Such an outcome deprives individuals and businesses of the substantial benefits of arbitration.

The American Health Care Association ("AHCA") is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million citizens who live in nursing facilities, assisted-living residences, sub-acute centers, and homes for persons with mental retardation and developmental disabilities. One way in which AHCA promotes the interests of its members is by participating as *amicus curiae* in cases with far-reaching consequences for its members, including cases brought under the Federal Arbitration Act.

The Illinois Health Care Association ("IHCA") is a non-profit organization comprising approximately 500 licensed and certified long-term care facilities and programs throughout the State of Illinois. Founded in 1950, the IHCA is the oldest and largest association of its kind in the State. Its members consist of proprietary and non-proprietary facilities which represent skilled, intermediate care, developmentally disabled, pediatric, assisted living and sheltered care levels of care. Collectively, IHCA's members provide health care to more than 31,000 people.

The Illinois Council on Long Term Care ("ICLTC"), founded in 1977, is a statewide, non-profit service association representing 24,000 long-term care professionals and caregivers serving over 30,000 residents in nearly 200 Illinois nursing and rehabilitation facilities. One way in which the ICLTC promotes progressive public policy on behalf of its members is by participating as *amicus curiae* in cases with far-reaching consequences for the long-term care profession.

SUMMARY OF THE ARGUMENT

The petition for a writ of *certiorari* explains how this case presents the ideal vehicle for resolving a mature and widening split among lower courts, especially state supreme courts, over the arbitrability of wrongful death claims. *Amici* endorse those arguments and, in this brief, offer three additional reasons supporting an order to grant the petition.

First, the decision below implicates several additional conflicts fairly included in the question presented. Lower courts disagree over the proper analytic method by which to decide whether wrongful death plaintiffs are bound to an arbitration agreement executed by the decedent: some courts train on the language of the arbitration agreement; others downplay the significance of the agreement and, instead, stress the precise legal contours of the claim. Additionally, courts divide over whether the treatment of nonsignatories is a "procedural" issue (subject to the forum's rules) or instead a "substantive" issue (generally subject to the law designated in the arbitration agreement). This division feeds into a third area of confusion – whether federal or state

law determines if nonsignatories are bound by the arbitration agreement.

Second, the issues raised by the petition are ones of nationwide importance, cutting across industries and threatening the integrity of the arbitral process. The clauses at issue in this case are based upon a model clause used at facilities throughout the nation, so the lower court's decision categorically excluding wrongful death claims undercuts arbitration agreements around the country. Moreover, these issues are not confined to the long-term care industry but instead arise in a variety of industries and affect a variety of agreements. These include, among others, patient agreements used by surgeons, employment agreements used by steel companies and consumer agreements used by retail sellers. Judicial decisions such as the one below that categorically refuse to permit arbitration of wrongful death claims undermine agreements in all these contracts and industries. They replace the bargained-for system of expeditious, cost-effective and confidential dispute resolution with an inefficient, duplicative system in which claims involving precisely the same set of facts are split across two different forums with two different decision makers. This costly state of affairs risks inconsistent outcomes and consequently gives rise to difficult and unnecessary questions of preclusion.

Third, the decision below is so clearly erroneous under this Court's prior decisions interpreting the FAA as to warrant this Court's intervention. This Court's decisions set forth the controlling rule: the Federal Arbitration Act displaces a state law prohibiting outright the arbitration of a particular type of claim. Relying on this rule, this Court recently held that the FAA preempted a construction of West

Virginia law by that state's highest court which, in relevant part, categorically declared wrongful death claims to be nonarbitrable. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*). In this case, by declaring wrongful death claims "separate and independent" from the decedent's estate, the Illinois Supreme Court simply attempts to accomplish indirectly what *Marmet* forbade state courts from doing directly. The lower court's purported distinction between wrongful death claims that are "derivative" and those that are "separate and independent" simply cannot explain the result in this case, particularly in a state like Illinois where plaintiffs in wrongful death actions are *bound* by other agreements, like releases, signed by the decedent. Stripped of its jargon, the decision below constitutes little more than latent judicial hostility toward arbitration agreements, a hostility that the FAA was designed to stamp out and that this Court does not tolerate.

ARGUMENT

I. LOWER COURTS DISAGREE ABOUT THE ANALYTIC METHOD USED TO DECIDE THE ARBITRABILITY OF WRONGFUL DEATH CLAIMS AND THE LAW APPLICABLE TO SUCH QUESTIONS.

The Federal Arbitration Act provides that "a written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be 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. The core question presented by this case is whether this language preempts a rule categorically prohibiting the arbitration of wrongful death claims pursuant to an arbitration clause in an agreement between the decedent and another party. As petitioner explains, lower courts are deeply divided on the answer to that core question.

A number of additional splits underlie this division. Lower courts disagree about the analytic method used to answer the core question. They also split over the law applicable to the question. These additional divisions of authority, implicated by the decision below, provide independent reasons why *certiorari* should be granted.

A. Lower courts employ inconsistent and unpredictable methods to determine the arbitrability of wrongful death claims.

Apart from the differences in results, lower courts addressing the arbitrability of wrongful death claims employ conflicting methodologies. Some courts decide the question by stressing the language of the arbitration agreement. *See, e.g., Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003). *Cf. Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010) (stressing language of arbitration agreement and state statute). The Colorado Supreme Court's decision in *Allen* exemplifies this approach. To support its holding that an arbitration agreement binds a non-party asserting a wrongful death claim, the *Allen* Court rested its conclusion on the fact that the agreement covered "*any* claim of medical malpractice," including those brought for "death," and extended the agreement to claims by an "heir or personal representative." *Id.* at 379-80. With this near exclusive reliance on the agreement's "plain

language," Colorado's highest court found "not helpful" arguments based on the "separate and distinct quality" of a wrongful death under Colorado law. *Id*. It likewise dismissed any reliance on the definition of "heirs" in Colorado's wrongful death statute, finding instead that the arbitration agreement swept broadly enough to encompass the spouse who was bringing the claim. *Id.* at 380.[2]

In contrast to the approach exemplified by *Allen*, other courts, including the court below, place more weight on the nature of a wrongful death action. *See, e.g., Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009). The Missouri Supreme Court's decision in *Lawrence* highlights the competing methodology. In *Lawrence*, the arbitration clause, just like the clause in *Allen*, encompassed "any and all claims." *Compare Lawrence*, 273 S.W.3d at 526, *with Allen*, 71 P.3d at 379. Likewise, in *Lawrence*, the arbitration clause, just like the clause in *Allen*, encompassed claims by "heirs" and "legal representatives." *Compare Lawrence*, 273 S.W.3d at 526, *with Allen*, 71 P.3d at 379. Nonetheless, unlike the Colorado Supreme Court, the Missouri Supreme Court accorded virtually no weight to this "plain language" in the arbitration agreement. Instead, the Missouri Supreme Court rested its analysis on the fact that Missouri's wrongful death statute created a "new cause of action" not derivative of claims held by the

[2] Ultimately, the Colorado Supreme Court concluded that the arbitration agreement was not enforceable because it failed to comply with provisions of Colorado's Health Care Availability Act. It found that the provisions of this act, setting forth precise form requirements for arbitration agreements, were not preempted by the Federal Arbitration Act because the McCarran-Ferguson Act displaced the FAA. 71 P.3d at 381-84.

decedent – *the very feature of a wrongful death statute found "not helpful" by the Colorado Supreme Court*. *Compare Lawrence*, 279 S.W.3d at 527, *with Allen*, 71 P.3d at 380.

The decision below highlights the potentially outcome-determinative difference between an approach focusing on the language of the arbitration agreement and one focusing on the nature of the wrongful death claim. Like the agreements in both *Allen* and *Lawrence*, the arbitration agreements in this case applied to "all disputes" including those "based on … tort." Pet. App. 55a. The arbitration agreements in this case, like those in *Allen* and *Lawrence*, bound not only the decedent but also "heirs" and "personal representative[s]." *Id.* 57a. Thus, under the test announced in *Allen*, this case would have come out differently. *See* Pet. App. 26a (declining to give effect to plain language of arbitration agreements). Under the test announced in *Lawrence*, the outcome would have turned on whether claims under Illinois' wrongful death statute are "derivative" of the decedent's claims or are "separate and independent" of them.

Several lower courts, particularly those holding wrongful death claims not arbitrable, have seized on this terminology ("derivative" vs "separate and independent") in an effort to explain the undeniable conflict among lower courts. *See, e.g., Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 598 (Ky. 2012); *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1261-62 (Ohio 2007). But they have been remarkably opaque about what precisely these terms mean. When stripped of its surface appeal, this distinction proves untenable and cannot explain the deep conflict

in the caselaw over the arbitrability of wrongful death claims.

At one level, all wrongful death claims are "separate and independent." As this Court previously has recognized, wrongful death claims did not exist at common law; once an individual died, any right of action for personal injuries was extinguished. *See Morange v. States Marine Lines, Inc.*, 398 U.S. 375, 380 (1970). *See generally* 4 F.V. Harper *et al.*, Harper, James and Gray on Torts §24:1 at 535-36 (3d ed. 2007); S. Speiser & J. Rooks, Recovery for Wrongful Death §6:1 at 6-5 (4th ed. 2005). As this rule fell under harsh criticism, numerous states adopted statutes expressly authorizing causes of action for wrongful death. Today, every state, as well as the District of Columbia, has done so. Speiser & Rooks, Recovery for Wrongful Death §6:2 at 6-7. Thus, by ensuring that claims for personal injuries do not extinguish upon a victim's death, wrongful death statutes give rise to a "separate and independent" cause of action. If the Illinois Supreme Court and other courts described above mean "separate and independent" in this sense, then their purported distinction lacks any explanatory value. All wrongful death actions are, in this regard, "separate and independent," even those actions in states holding wrongful death claims arbitrable.

Alternatively, the distinction between "separate and independent" and "derivative" might turn on the measure of damages. In most states, damages in wrongful death actions are measured by the loss suffered by the decedent's survivors. 4 Harper, James and Gray on Torts §24:1 at 540. In a few states, damages are measured by the loss to the decedent's estate. *Id.* at 542-43. With respect to

damages, then, the latter category of states might be described as having "derivative" causes of action. But the quantum of damages has absolutely no bearing on the identity of parties to the agreement. Nor does the classification of states falling in the majority or minority on the damages rule correspond to the state rules on the arbitrability of wrongful death claims. *See* Speiser & Rooks, Recovery for Wrongful Death §§6:2-.3. Again, by this meaning, the purported distinction between "derivative" and "separate and independent" has absolutely no power to explain the conflicting legal rules on the arbitrability of wrongful death claims.

Finally, the distinction between the two terms might concern the relationship between the wrongful death claim and the decedent's entitlement to recover had he survived. In this context, the ability of plaintiffs to recover for wrongful death can be limited by the decedent's conduct. *See generally* Harper, James & Gray on Torts §§24.4-.6 For example, if the decedent had previously recovered for injuries before the death, then wrongful death plaintiffs cannot recover for those same injuries. *Id.* Likewise, if claims by the decedent would be subject to defenses (like contributory negligence or assumption of risk), then those defenses are equally available to a cause of action for wrongful death. *Id.* Finally, if the decedent has released the defendant from liability, that release can be effective against the wrongful death plaintiffs. *Id.*

Even in this third and final respect, the purported distinction between "derivative" causes of action and "separate and independent" ones cannot explain away the conflict over the arbitrability of wrongful death claims. As the Eleventh Circuit recently noted,

wrongful death plaintiffs in Alabama are bound by the arbitration agreement even though the cause of action is "separate and independent." *See Entrekin v. Internal Med. Assocs. of Dothan*, 689 F.3d 1248, 1253-54 (11th Cir. 2012). *See also Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661 (Ala. 2004). By contrast, other states refuse to bind the wrongful death plaintiff to the decedent's arbitration agreement even though the plaintiff's ability to recover damages is tied to the defendant's conduct. For example, in Illinois, wrongful death plaintiffs are bound by a release signed by the decedent. *See* Pet. 32 (collecting Illinois cases). *See also Meads v. Dibblee*, 350 P.2d 853, 855 (Utah 1960) (noting that a Utah wrongful death action is derivative in the sense that it will not lie without a viable underlying personal injury claim). Despite this "derivative" nature of wrongful death actions in Illinois, the court below inexplicably held that wrongful death plaintiffs are not bound by the decedent's arbitration agreement. *See* Pet. App. 22a-24a.

At bottom, when tested against the range of possible meanings, the proposed distinction between "derivative" and "separate and independent" actions simply does not withstand scrutiny. Instead, it supplies a source of confusion in this area of the law that undermines certainty and predictability.

B. Lower courts employ conflicting approaches when determining the law applicable to the arbitrability of wrongful death claims and similar questions about what parties are bound to an arbitration agreement.

Differences in analytical approach are not the only split implicated by the decision below. Courts also

disagree over an antecedent question – namely what law should they apply when deciding whether to find wrongful death claims arbitrable. The choice-of-law confusion persists at two levels.

First, courts employ different methods to determine *which* state law controls whether nonsignatories are bound to the arbitration agreement. Some courts apply their own law on the grounds that the issue is a "procedural one." *See, e.g., In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) ("We apply Texas procedural rules in determining whether nonsignatories are bound by an arbitration agreement."); *Washburn v. Beverly Enterprises-Georgia, Inc.*, No. CV 106 051, 2006 WL 3404804 at *4-5 (S.D. Ga. Nov. 14, 2006) (describing whether arbitration agreement binds signatories in wrongful death action as "procedural" not "substantive" question). Others apply the law designated in the parties' choice of law clause. *See, e.g., Entrekin*, 689 F.3d at 1251 ("The Dispute Resolution Agreement states that it 'shall be interpreted, construed and enforced pursuant to and in accordance with the laws of Alabama,' so we look to the decisions of the Alabama Supreme Court to determine if the district courts should have compelled arbitration of the wrongful death claim in this case.").[3]

[3] This Court's decision in *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (*per curiam*) arguably bears on this question but, again, does not cleanly dispose of it. In *Cocchi*, this Court reversed a state court's decision refusing to compel arbitration of *any* claims based on its conclusion that at least *some* of the claims were not arbitrable. In reaching that conclusion, the Court noted that "whether the claims in the complaint are arbitrable turns on whether they must be deemed direct or derivative under Delaware law." *Id.* at 25. The Court made this observation only after previously noting that "both parties agree [that

Here too resolution of the choice of law issue has important forum-shopping implications. A single contract covering a single set of facts could be subject to two radically different interpretations depending simply on whether the forum in which the arbitration clause is being contested follows its own "procedural" rules governing nonparties or, instead, follows the choice-of-law clause contained in the arbitration agreement. Moreover, if the Texas Supreme Court is correct that the forum's "procedural rules" govern "whether nonsignatories are bound by an arbitration agreement," that conclusion too could have important implications for federal cases arising under diversity jurisdiction. A federal court in that case would then apply its own rules, rather than state-law rules, to decide the question.

This confusion over the procedural/substantive question feeds into a second area of confusion – whether federal or state law governs the issue. While many courts, like the court below, conclude that state law controls whether heirs and personal representatives are bound to arbitrate their wrongful death claims, not all do. *Compare, e.g., Entrekin*, 689 F.3d at 1251 (applying state law), *with Graves v. B.P. Am., Inc.*, 568 F.3d 221 (5th Cir. 2009) (*per curiam*) (declining to decide whether to apply state or federal

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Delaware law] was applicable." *Id.* *See also KPMG LLP v. Cocchi*, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010) (noting that the parties had stipulated that Delaware law governed the question because the relevant entities were Delaware partnerships). The arbitration agreements in this case contain two choice of law clauses – one specifying that the agreement "will be governed by the Federal Arbitration Act," Pet. App. 55a, and another providing that "[i]n rendering a decision on the merits of the claim(s), the arbitrators shall apply the substantive law of the State of Illinois." Pet. App. 56a.

law). The Fifth Circuit's decision in *Graves* traces the confusion to the complex choice-of-law regime governing arbitration agreements subject to the FAA:

> A motion to compel arbitration presents two questions. First, whether there is a valid agreement to arbitrate, and second whether the dispute in question falls within the scope of the arbitration agreement. In answering the first question of contract validity we apply ordinary state law principles that govern the formation of contracts. The second question of scope, however, is answered by applying the federal substantive law of arbitrability. While this is clear, there is less certainty over what law governs whether a nonsignatory should be compelled to arbitrate a question seemingly falling between validity and scope. And, in fact, we have cases applying state law and others applying federal law. *Id.* at 222-23 (citations footnotes, and internal quotations omitted).

Ultimately, the Fifth Circuit in *Graves* could pretermit the question. In that case, both state and federal law "doveatail[ed] to provide the same outcome." *Id.* at 223. Yet *Graves* and other cases illustrate the lingering confusion over this point, one that many courts have elided. *See also Covington v. Aban Offshore Ltd.*, 650 F.3d 556, 559 n. 2 (5th Cir. 2011) (declining to decide whether federal or state law binds nonsignatories to arbitration agreement). To the extent these claims may be brought in federal or state court, this lingering confusion also can give rise to blatant forum shopping, a state of affairs this Court has sought to avoid in its FAA jurisprudence. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S.

265, 272 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).[4]

In sum, the decision below implicates several conflicts of authority among the lower courts. In addition to the basic split over the arbitrability of wrongful death claims, explained in the petition, the lower court's decision exacerbates confusion over the method used to analyze these questions as well as the law applicable to them.

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[4] This Court's decision in *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624 (2009), arguably bears on the question of applicable law but does not cleanly dispose of the question presented here. There, this Court held that a federal appellate court had jurisdiction to hear an appeal of a denial of a motion to compel arbitration brought by entities that were not signatories to an arbitration agreement. In reaching that conclusion, the Court noted that "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theory, waiver and estoppel." *Id.* at 631 (citation and internal quotations omitted). The Court made this observation in order to reject the lower court's federal rule categorically holding that nonparties could not be bound by an arbitration agreement. *See id.* at 631 n. 6 (stating that the federal rule requiring questions of arbitrability to be resolved in favor of arbitration "cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement."). This case, by contrast, presents the converse situation – namely a state law rule categorically *forbidding* the arbitrability of a certain class of claims clashing with the same federal principle favoring arbitrability.

II. THE LOWER COURT'S DECISION UNDERCUTS ARBITRATION CLAUSES EMPLOYED IN A VARIETY OF INDUSTRIES, INCLUDING MODEL CLAUSES USED THROUGHOUT THE NATION IN THE LONG-TERM CARE AND HEALTH CARE INDUSTRIES.

Apart from the significant divisions of authority implicated by the decision below, an additional set of considerations counsels in favor of granting the petition: the issues raised by the decision below are important in three different respects.

First, the decision below partly undercuts a model arbitration agreement used widely within the nursing home industry. Firms in the nursing home industry often use arbitration agreements. *See, e.g., Laizure v. Avante at Leesburg, Inc.*, No. SC 10-2132, 2013 WL 535417, at *1 (Fla. Feb. 14, 2013); *Ping*, 376 S.W.3d at 586; *Entrekin*, 689 F.3d at 1249; *Lawrence*, 273 S.W.3d at 526; *Briarcliff*, 894 So.2d at 663. They have done so with the express sanction of the Department of the Health and Human Services, which has instructed that "[u]nder Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home." Dep't of Health and Human Services, Centers for Medicare & Medicaid Services, Memorandum of Steve Pelovitz, Director of Survey and Certification Group (Jan. 9, 2003). Consistent with that sanction, the long-term care industry has developed model arbitration agreements, which formed the basis for the agreement used in this case and which are widely used throughout the country. Pet. App. 54a, 61a.

The arbitrability of wrongful death claims is an important part of that system's integrity. Those

claims can involve protracted, costly public litigation that is not in the interest of the deceased, her family or the provider. By contrast, arbitration offers an expeditious, private setting in which such claims can be resolved. Model arbitration agreements such as the one below facilitate this process by extending certain rights (such as the coverage of attorneys' fees or a unilateral right to choose the forum) that would not necessarily be available in litigation. Moreover, because these arbitrations take place under the auspices of a nationally recognized arbitration association such as the American Arbitration Association, they are likely subject to special "Due Process Protocols" which ensure individuals are accorded ample procedural rights in the arbitrations. *See* Christopher R. Drahozal, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289, 301 (2012) (describing the Consumer Due Process Protocol and the Health Care Due Process Protocol). Consequently, as one nursing-home provider explained to Congress, arbitration "may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation." *J. Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights of the S. Judiciary Comm. and the Special Comm. on Aging* (June 18, 2008) at 108 (statement of Kelley Rice-Schild, Executive Director, Floridean Nursing and Rehabilitation Center). By creating a categorical exception for wrongful death claims (and other claims that inure to the benefit of personal representatives and heirs), the decision below undercuts this scheme, depriving families of these benefits and depriving providers of any certainty about the competent forum.

Second, the arbitrability of wrongful death claims implicates agreements in a variety of industries. Naturally, such issues regularly arise in the health care setting, where surgeons and physicians routinely must execute difficult procedures that carry a risk of death. Such health care providers sometimes employ arbitration agreements, often for the same reasons as long-term care providers *See* American Health Lawyers Ass'n, Guide to Health Care Legal Forms at 1-14 (2d ed. 2012) (sample arbitration agreements). So the arbitrability of wrongful death claims represents a recurring issue for that industry, and its continued viability may hinge upon the resolution of the conflicts implicated by the decision below. *See, e.g., Allen*, 71 P.3d at 377 (nationwide provider of health care services); *Clay v. Permanente Med. Group, Inc.*, 540 F. Supp. 2d 1101, 1103 (N.D. Cal. 2007) (same); *Bybee*, 189 P.3d at 41 (physician); *Ruiz*, 237 P.3d at 841-42 (surgeon); *Ballard v. S.W. Detroit Hosp.*, 327 N.W.2d 370, 371 (Mich. Ct. App. 1982) (hospital).

Nor does the issue simply arise in the context of the long-term care or health care industries. Rather, as this Court knows, arbitration agreements also are used in employment contracts. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Here too, certain work settings entail a risk of serious injury or even death. In those industries too, the arbitrability of wrongful death claims is a recurring issue. *See, e.g., In re Labatt*, 279 S.W.3d at 642 (food service); *Graves*, 568 F.3d at 222 (energy); *Peters*, 873 N.E.2d at 1260 (steel); *In re Jindal Saw Ltd.*, 264 S.W.3d 755, 759 (Tex. Ct. App. 2008) (same); *Shanks v. Swift Transp. Co.*, No. L-07-55, 2008 WL 2513056 (S.D. Tex. June 19, 2008) (truck driving); *Stringer v. Nat'l Football League*, 474 F.Supp.2d 894, 913 (S.D.

Ohio 2007) (professional sports collective bargaining agreement). Consumer contracts too are an area where arbitration agreements are used, and the arbitrability of wrongful death claims can arise there. *See, e.g., Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fl. 1999) (home construction); *Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co.*, 367 F.Supp.2d 711 (E.D. Pa. 2005) (retail sales of consumer appliances). Consequently, the categorical refusal of the court below (and other courts similarly inclined) to permit arbitration of wrongful death claims casts doubt on the scope and enforceability of arbitration agreements used in a variety of industries.

Third, regardless of the industry affected, the categorical refusal of some courts to permit arbitration of wrongful death claims risks inefficient proceedings and inconsistent results. Wrongful death claims are rarely brought in isolation. Rather, they often are part of an array of claims brought against a care provider (or employer). Other claims often include "survival" claims, in which heirs, beneficiaries, successors or assigns of the deceased's estate bring claims for the injuries that the decedent suffered before her death. *See* Pet. App. 15a-16a (contrasting wrongful death claim and survival claim under Illinois law). Even courts holding that wrongful death claims are not arbitrable recognize that, by contrast, survival claims remain subject to the arbitration clause signed by the decedent. *See, e.g., Peters*, 873 N.E.2d at 1262. Indeed, the court below recognized that "[f]or purposes of count I of the complaint, which alleges a violation of the Nursing Home Care Act by defendant pursuant to our survival statute, plaintiff is bound to arbitrate that claim … ." Pet. App. 26a.

This bifurcation of the claims creates an untenable state of affairs in which the exact same course of conduct is subject to two different hearings, in two different forums, before two different sets of decision makers. Such an inefficient system runs contrary both to the parties' intentions and to the purposes of this Court's pro-arbitration jurisprudence. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

Moreover, splitting claims arising out of the same set of facts carries a significant risk of inconsistent results. Whichever decision is rendered first – whether a judicial judgment on the wrongful death claim or an arbitral award on the survival (and other) claims – might be used for claim-preclusion or issue-preclusion purposes in the other forum. But there is no guarantee that the decision maker in the second forum will grant preclusive effect to the first decision. In the event an arbitrator decided first, a court might conclude that the award was not entitled to preclusive effect, a position that Respondent has advanced in this litigation. *See* Plaintiff-Appellee's Objections to Motion to Stay Issuance of the Mandate in *Carter v. Odin*, No. 113204 at 3 ("Neither res judicata nor collateral estoppel will apply as there is no privity between the Appellee as administrator of Joyce Gott's Estate and the Appellee as Special Administrator and wrongful death beneficiary."). In the event a

court ruled first, an arbitrator's refusal to accord preclusive effect to a prior judgment in the wrongful death action would not supply a basis for vacatur of the award. *See* 9 U.S.C. § 10. Consequently, both sides in these disputes either end up in a situation where there is a race to judgment or in a situation where two decision makers reach diametrically opposed conclusions about the liability (or lack thereof) of the defendant.

III. THE LOWER COURT'S CATEGORICAL REFUSAL TO PERMIT ARBITRATION OF WRONGFUL DEATH CLAIMS IS IRRECONCILABLE WITH THIS COURT'S DECISIONS AND, UNLESS CORRECTED, PROVIDES A ROADMAP WHEREBY OTHER COURTS CAN CIRCUMVENT THIS COURT'S DECISION IN *MARMET*.

This Court previously has set forth the analytic framework that a court should use when deciding whether to enforce an arbitration agreement. As the Court explained in *Southland*:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce," and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.

465 U.S. at 10-11 (footnote omitted). As this case reaches this Court, neither of these "two limitations"

is at issue. The arbitration agreement is part of a contract "evidencing a transaction involving commerce." Moreover, the case does not present a "ground … at law or in equity for the revocation of any contract."

While Section 2's savings clause has been interpreted by this Court to allow courts to subject arbitration agreements to generally applicable contract defenses, this Court has chastened lower courts when their purported exercise of this authority under the savings clause does little more than try to mask an anti-arbitration rule under the guise of a generally applicable contract defense. Thus, for example, in *Concepcion*, this Court held that Section 2 of the Federal Arbitration Act preempted California's rule which had sought to define its unconscionability "ground" to include all arbitration clauses containing class waivers. 131 S. Ct. at 1747. Such a result was necessary to ensure that judicial constructions of Section 2 did not accomplish indirectly what the Federal Arbitration Act forbade state legislatures from accomplishing directly. *Compare* O.C.G.A. 9-9-2(c)(10) (provision of Georgia Arbitration Act categorically invalidating agreements providing for arbitration of wrongful death claims), *with Primerica Fin. Servs., Inc. v. Wise*, 456 S.E.2d 631, 635-36 (Ga. Ct. App. 1995) (FAA preempts application of provisions of Section 9-9-2(c) to arbitration agreement subject to federal law).

This same sentiment – constraining anti-arbitration rules masquerading as generally applicable contract doctrines – animated this Court's more recent decision in *Marmet Health Care Ctr, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*). In *Marmet*, the Supreme Judicial Court of West Virginia had de-

clared non-arbitable wrongful death and personal injury claims. In an effort to evade Section 2's preemptive sweep, the lower court in *Marmet* attempted to anchor this categorical rule in the "public policy" doctrine. Even though "public policy" represented a general defense to contract enforcement, this Court unanimously held that Section 2 preempted this judicial construction of West Virginia law. The Court rested its conclusion on the rule announced in *Concepcion* – "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 132 S. Ct. at 1203 (quoting *Concepcion*, 131 S. Ct. at 1747).

Here, the lower court decision, just like the lower court decision in *Marmet*, "prohibits outright the arbitration of a particular type of claim" – to wit, wrongful death claims. Thus, the result should be precisely that dictated by *Concepcion* and *Marmet* – the FAA displaces the state rule. The court below (and other courts categorically holding wrongful death claims non-arbitrable) attempt to evade the logic of this argument by characterizing wrongful death claims as "separate and independent." That proffered distinction simply does not withstand close scrutiny. As noted above, some states opposing the arbitrability of wrongful death claims like Illinois bind wrongful death plaintiffs to the contractual releases signed by decedents. Nonetheless, courts in those same states, like the court below, often claim disingenuously that their wrongful death causes of action are "separate and independent." Moreover, that distinction simply elides the possibility that other grounds, like equitable estoppel, might reasonably bind the non-signatories. At bottom, these labels may merely mask an anti-arbitration bias

among these courts, one that treats arbitration agreements differently from other agreements signed by decedents and, thus, cannot be reconciled with this Court's precedents interpreting Section 2.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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