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

AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL, ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA, AND CALIFORNIA ASSOCIATION OF HEALTH FACILITIES IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI*[1]

Amici curiae Association of Southern California Defense Counsel and Association of Defense Counsel of Northern California and Nevada ("Defense Counsel") are non-profit California corporations established more than 50 years ago as voluntary professional associations of civil defense trial attorneys to promote the administration of justice and to enhance the standards of civil defense and trial practice. Defense Counsel have over 2,000 member-attorneys who represent businesses and professionals, including medical providers and long-term care facilities, before the state and federal courts in several of the western states within the Ninth Circuit.

Amicus curiae California Association of Health Facilities ("CAHF") is a non-profit association representing approximately 1,600 licensed skilled nursing, intermediate care, and subacute facilities in the State of California. Its member facilities employ more than 80,000 persons

[1] Counsel for the Petitioner filed with the Court on February 19, 2013 a letter consenting to the filing of all briefs *amicus curiae* with regard to the Petition. On March 8, 2013, counsel of record for both parties received notice of the *amici curiae*'s intention to file this brief. Consent of counsel for the Respondent was requested and was provided in writing in a letter lodged currently with this brief. *See* Sup. Ct. R. 37.2(b). No counsel for any party authored this brief in whole or in part, and no one other than the instant *amici* and their counsel and members made any monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

in California, and serve more than 200,000 patients at their facilities per year.

Amici and their members have substantial interests in the resolution of the issue presented. As associations whose membership engages in the provision of health care and/or legal services in California, a state in which the Legislature enacted a statute specifically acknowledging the availability and enforceability of arbitration agreements for wrongful death claims arising from medical negligence, *amici* can provide the Court with a perspective on some of the reasons why such a rule is beneficial.

The attorney-members of *amici* Defense Counsel are regularly called upon to represent professional clients (such as health care providers and nursing homes) in cases before state and federal courts involving interpretation and enforcement of agreements to arbitrate; including participation by several members who appeared as counsel for certain defendants and *amici* in *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010), in which the California Supreme Court recently addressed a substantially similar question of enforcement of arbitration contracts entered into by decedents and health care providers consistent with the governing standards of the Federal Arbitration Act ("FAA"). *Id.* at 586 ("when a person seeking medical care contracts with a health care provider to resolve all medical malpractice claims through arbitration, does that agreement apply to the resolution of wrongful death claims, when the claimants are not

themselves signatory to the arbitration agreement?").

CAHF has participated either as a party or as an *amicus* in significant decisions issued by California's state and federal courts impacting the long-term care industry. For example, CAHF appeared as *amicus curiae* in *Ruiz* and was a plaintiff in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), in which the Court ruled that California statutes were preempted by the National Labor Relations Act.

Until this Court clarified the controlling principles under the FAA favoring arbitration, for decades the state courts had long struggled with the issue of whether arbitration agreements between health care providers and patients bind spouses and children of the patients who file wrongful death actions. *See generally Ruiz*, 237 P.3d at 588-89. As acknowledged by *Ruiz* and aptly noted in the Petition, in recent years, a growing number of state and federal courts have adopted a view consistent with the signatory's intent that also comports with this Court's jurisprudence in the area of FAA preemption by upholding arbitration agreements executed by decedents in the context of wrongful death claims. *Ibid.*; Pet. at 15-22.

The Illinois Court's inconsistent analysis defies notions of uniformity and certainty of enforcement under the FAA. The Illinois Court's reasoning (and the similar decisions it relied upon) reflects an overly narrow interpretation of the FAA that is fundamentally hostile to arbitration and

threatens to undermine the strong legislative policies favoring arbitration underlying the federal statutory scheme. If allowed to stand, Illinois's approach would result in the piecemeal and haphazard application of the FAA to claims asserted by the decedent's heirs – depending upon the whims of a particular state, survivorship claims for personal injury are subject to arbitration whereas claims for wrongful death (against the same defendant arising out of the same conduct) are not.

Amici urge this Court to grant certiorari to definitively resolve the conflict.

SUMMARY OF ARGUMENT IN SUPPORT OF THE PETITION

Amici join the Petitioner in asking this Court to grant certiorari and review the Illinois Supreme Court's decision in *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344 (Ill. 2012). That decision invalidates a class of arbitration agreements – those that include wrongful death claims brought by heirs of a decedent who signed an agreement to arbitrate all claims arising from a health care provider's negligence. The FAA disallows such a rule of state law. Further, the high courts of other states have reached conflicting conclusions as to the enforceability of such agreements, and the Illinois rule exacerbates the inconsistency and undermines the FAA's goal of uniformity.

In this brief, *amici* explain the rationale that led the state of California to enact a statute

allowing arbitration of all professional negligence claims, including wrongful death – in particular, the profound negative impact of widespread personal injury litigation on the cost of medical malpractice insurance, and other health care costs. Allowing a rule such as the Illinois court's to stand conflicts with the FAA and allows states to formulate rules that will necessarily lead to increased health care costs at a time of focused efforts on both federal and state levels to rein them in. *Amici* request that this Court grant certiorari and reverse the Illinois Supreme Court, or, in the alternative, vacate the decision.

ARGUMENT IN SUPPORT OF THE PETITION

I.
THE ILLINOIS COURT'S DECISION THREATENS THE ENFORCEABILITY AND CONSISTENT APPLICATION OF ARBITRATION AGREEMENTS EXECUTED BY DECEDENTS UNDER THE FAA

The decision of the Supreme Court of Illinois impermissibly restricts the enforceability of a certain class of arbitration clauses. As discussed in the Petition, such state-law restrictions conflict with the strong federal policy favoring enforcement of arbitration clauses and thus are preempted by the FAA. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The

conflicting rule is displaced by the FAA."). As arbitration clauses are increasingly standard in health care admission or patient treatment agreements, the Petition presents an important issue that has far-reaching implications for businesses and individuals engaged in the profession of rendering health care.

The patent conflict between the opinion of the Illinois Supreme Court and that of other state courts facing a virtually identical question means that health care businesses that operate in multiple jurisdictions face uncertainty and instability in the application and enforcement of standard arbitration agreements. It also means that even in those states that have not yet addressed the issue of enforceability of arbitration clauses against non-signatory heirs, the subject matter is up for grabs on a state-by-state basis, resulting in a web of different and inconsistent rules. If the Illinois decision is allowed to stand, surely other states will be emboldened to defy the dictates of the FAA and issue similar decisions or even enact legislation that cuts off health care providers' ability to enforce valid arbitration clauses voluntarily signed by their patients. Allowing the Illinois decision to stand not only undermines uniformity and what is supposed to be consistent national policy toward enforcement of arbitration clauses, but will condone an environment in which every state or jurisdiction essentially is free to make up its own rule on this point, ignoring the FAA.

This Court has often articulated the strong federal policy favoring enforcement of arbitration clauses. *See, e.g., Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) (citing *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam)). As explained below, in the context of wrongful death claims – the specific subject of the Illinois Supreme Court's non-enforcement holding – the right to arbitrate is particularly significant. The fact that varying and inconsistent approaches to the enforceability of arbitration agreements have developed in the states merits special attention. The instability and variability of the law on this subject threatens to impose increasing burden and cost on the health care industry, already suffering from resources stretched to the maximum.

Against the backdrop of health care costs spiraling out of control and a concerted effort at the federal and state level to contain them, arbitration clauses in health care contexts serve a special, and necessary, cost-control purpose. This purpose was carefully analyzed and considered in the mid-1970s, when the California Legislature enacted the Medical Injury Compensation Reform Act ("MICRA"). MICRA was a response to increasing medical malpractice judgments and related skyrocketing malpractice insurance premiums, which were leading insurers to flee the California malpractice market. *See Ruiz*, 237 P.3d at 587. One key provision of MICRA is California Code of Civil Procedure section 1295, which delineates the requirements for an agreement to arbitrate "any dispute as to professional negligence of a health

care provider." The statute itself defines "professional negligence" to include wrongful death claims, and the California Supreme Court recently confirmed that such arbitration provisions are binding on the signatory's heirs who wish to bring a wrongful death claim – the precise opposite of what the Illinois Supreme Court decided here. *See Ruiz*, 237 P.3d 584.

The *Ruiz* Court specifically explained the underlying concerns that mandate broad interpretation and enforcement of arbitration clauses in this context:

> "Section 1295 was enacted as part of [MICRA]. MICRA was a response to a perceived crisis regarding the availability of medical malpractice insurance. 'The problem ... arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as "skyrocketing" rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk

> procedures or treatment, to terminate their practice in this state altogether, or to "go bare," i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice.'"

Ruiz, 237 P.3d at 587 (quoting *Reigelsperger v. Siller*, 150 P.3d 764 (Cal. 2007)).

As California and other states have correctly recognized, and as Illinois has refused to recognize, enforcing arbitration clauses so as to require a decedent signatory's heirs to arbitrate wrongful death claims directly impacts concerns of controlling malpractice insurance costs. Necessarily, then, uniformity of enforcement impacts health care costs, which increase as needed to reflect insurance premiums. It also impacts health insurance rates for consumers (employers and individuals/families), as the underlying costs grow.[2] The entire cost structure of the health care industry is negatively affected.

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[2] *See, e.g.,* Joseph B. Treaster, *Malpractice Rates Are Rising Sharply; Health Costs Follow*, THE NEW YORK TIMES (Sept. 10, 2001), *available at* http://www.bing.com/search?q=medical+malpractice+insurance+premiums+raise+health+care+costs&src=IE-SearchBox&Form=IE8SRC.

Not only does such a result fail to accord any respect to the national interest in controlling health care costs, it actually accomplishes the opposite. Non-enforcement of arbitration clauses in surviving heirs' wrongful death claims means that any wrongful death suit in the health care context can, and often will, be split into two parallel actions: (1) the claims for personal injury brought by the decedent's estate, which must be arbitrated where the decedent agreed to do so; and (2) the wrongful death claim, brought by the same persons (in their individual capacity) against the same defendant health care provider, which could be litigated in courts. Both cases would arise from a single relationship between the provider and the decedent, and allege identical acts of wrongdoing based on a single set of facts and a single patient outcome. The parties must engage in discovery and proceedings that are entirely duplicative, and obviously wasteful. The court system will become, or remain, burdened by the very glut of professional negligence lawsuits that standard arbitration provisions serve to reduce or avoid. And there is a manifest risk, even a likelihood, of flatly inconsistent and conflicting decisions on literally the same facts and the same allegedly wrongful acts. Thus, the rule of non-enforcement multiplies expense and disputes rather than containing them. It makes no sense to exempt an entire tort claim from arbitration, when (as in this case and others) the claim necessarily arises from alleged acts or omissions in the provision of health care to a patient with whom the health care provider has agreed to arbitrate all claims, without exception.

The legislative history leading to the enactment of the California statute, Code of Civil Procedure section 1295, identifies some of the salient features of arbitration that make it particularly well-suited for professional malpractice claims, including wrongful death:

> [A]rbitration proceedings possess the following advantages: 1) proceedings are conducted in comparative privacy; 2) the proceeding is far more economical than a court trial and the disposition of cases are [sic] speedier; 3) if the arbitrator is properly selected, he will be objective; and 4) that arbitration will not promote a plethora of lawsuits.

Assembly Comm. on Medical Malpractice, Preliminary Report at 57 (June 1974), (Assemblyman Henry A. Waxman, Chairman) (discussing a study of arbitration for health care providers); *see also Executive Proclamation* of Governor Brown (May 16, 1975) (discussing crisis in cost of medical malpractice insurance and asking the California Legislature to consider, among other things, "[v]oluntary binding arbitration in order to quickly and fairly resolve malpractice claims while maintaining fair access to the courts").[3]

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[3] *See also* David Zukher, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV.

The time for this Court to address this issue is now. In just the past year, closely related issues have been presented to this Court, in *Marmet*, 132 S. Ct. 1201 (reversing a decision from the West Virginia Supreme Court of Appeals that voided agreements to arbitrate any claim for wrongful death *or* personal injury signed by a deceased patient on public policy grounds), and in the pending petition in *Beverly Enterprises, Inc. v. Ping*, Dkt. No. 12-652 (challenging a decision of the Kentucky Supreme Court). And the issue has continued to surface regularly over the last few years in state supreme and appellate courts as well as lower federal courts, as catalogued in the Petition. Further, as the Petition explains, the precise legal issue is cleanly teed-up in this Petition, unburdened by ancillary legal issues or complex factual disputes.

II.
ALTERNATIVELY, THE ILLINOIS COURT'S DECISION SHOULD BE VACATED

Citing the Supremacy Clause of the United States Constitution, during recent terms, this Court has simply vacated state court decisions that misconstrue and misapply the directives of the FAA: "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Marmet Health Care Center, Inc. v.*

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135 (1999) (discussing advantages of arbitration in the health care context).

Brown, 132 S. Ct. at 1202 (per curiam);[4] *see also Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (per curiam) (vacating Oklahoma Supreme Court decision that "disregards this Court's precedents on the FAA"); *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (per curiam) ("Judgment vacated, and case remanded to the Supreme Court of California for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).").

The Illinois Supreme Court's judgment suffers from the same infirmity. In the alternative to a grant of certiorari, the opinion should be vacated.

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[4] West Virginia's highest court dubiously declared that state public policy rendered "unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes." *Ibid.*

CONCLUSION

The issue presented in the Petition is important, of broad application and interest, and in present need of resolution. Certiorari should be granted so this Court can standardize the approaches developed in the states to form one clear rule on enforcement of arbitration clauses in wrongful death proceedings.

Respectfully submitted,

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