

No. 12-1012

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**In the Supreme Court of the United States**

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SSC ODIN OPERATING COMPANY LLC,  
D/B/A ODIN HEALTHCARE CENTER, PETITIONER

*v.*

SUE CARTER, SPECIAL ADMINISTRATOR  
OF THE ESTATE OF JOYCE GOTT

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ILLINOIS*

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**REPLY BRIEF FOR THE PETITIONER**

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## **CORPORATE DISCLOSURE STATEMENT**

The corporate disclosure statement contained in the petition for a writ of certiorari remains accurate.

## TABLE OF CONTENTS

	Page
A. The Supreme Courts of Illinois and Texas Have Issued Conflicting Decisions on the Same Question of Federal Law .....	3
B. The Petition Presents an Important Issue of Federal, Not State, Law .....	5
C. The Estate Administrator Concedes That This Case Provides an Ideal Vehicle In Which to Resolve the Wrongful-Death Issue, Which Has Nationwide Importance.....	8

## TABLE OF AUTHORITIES

### Cases:

<i>Doctor's Assocs., Inc. v. Casarotto</i> , 517 U.S. 681 (1996).....	6
<i>In re Labatt Food Serv., L.P.</i> , 279 S.W.3d 640 (Tex. 2009) .....	<i>passim</i>
<i>Laizure v. Avante at Leesburg, Inc.</i> , --- So. 3d ---, No. SC10-2132, 2013 WL 535417 (Fla. Feb. 14, 2013).....	4, 5, 7
<i>Marmet Health Care Ctr., Inc. v. Brown</i> , 132 S. Ct. 1201 (2012) (per curiam) .....	6
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	6
<i>Peters v. Columbus Steel Castings Co.</i> , 873 N.E.2d 1258 (Ohio 2007).....	5
<i>Ping v. Beverly Enters., Inc.</i> , 376 S.W.3d 581 (Ky. 2012) .....	7

Cases—Continued:	Page
<i>Preston v. Ferrer</i> , 552 U.S. 346 (2008).....	6
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	6
Statutes:	
740 Ill. Comp. Stat. 180/1 .....	5
9 U.S.C. § 2.....	<i>passim</i>
Fla. Stat. § 768.19 .....	4
Ohio Rev. Code Ann. § 2125.01.....	5
Tex. Civ. Prac. & Rem. Code § 71.003(a).....	5

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**REPLY BRIEF FOR THE PETITIONER**

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The state courts of last resort in two of the Nation’s most populous States have issued conflicting decisions on the same important question of federal law: does Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, preempt a state rule of law treating arbitration agreements signed by decedents differently than other contracts signed by decedents? In this case, the Supreme Court of Illinois held that, although it will enforce *settlement* agreements signed by decedents that extinguish wrongful-death claims completely, it will not enforce *arbitration* agreements signed by decedents that merely specify the forum in which such claims must be litigated. In so ruling, the Supreme Court of Illinois rejected the Supreme Court of Texas’s holding that the FAA preempts the “anomalous” rule of law adopted by Illinois—a rule of law also deemed “anomalous” by the Supreme Court of Florida earlier this year.

The foregoing conflict exists against a backdrop of great legal uncertainty regarding the arbitrability of wrongful-death claims generally. Eleven state courts of last resort have wrestled with the issue recently and have reached conflicting results: six have enforced arbitration agreements signed by or on behalf of decedents; five have refused to do so. Lower state and federal courts are in similar disagreement.

The FAA's preemptive effect in the wrongful-death context also constitutes an issue of significant importance to all segments of the health care industry and to employers generally. Two groups of *amici curiae* have now urged the Court to grant review in this case, further demonstrating that the petition's assertions regarding the wrongful-death issue's importance were not mere puffery.<sup>1</sup>

In short, this Court has not yet defined the precise contours of the FAA's preemptive effect in the wrongful-death context. This case provides the Court with an ideal vehicle in which to do so. The brief in opposition filed by respondent Sue Carter (Estate Administrator) provides no persuasive reason why the Court should delay resolving that recurring issue

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<sup>1</sup> See Br. of Am. Health Care Ass'n et al. as *Amici Curiae* in Supp. of Pet. (Mar. 18, 2013) (AHCA *Amicus* Br.); Br. of Ass'n of S. Cal. Def. Counsel et al. as *Amici Curiae* in Supp. of Pet. (Mar. 18, 2013) (Def. Counsel *Amicus* Br.); see also Pet. for Cert., *Beverly Enters., Inc. v. Ping*, No. 12-652 (U.S. Nov. 20, 2012) (seeking review of similar wrongful-death issue arising from the Supreme Court of Kentucky's recent anti-arbitration decision); Br. *Amici Curiae* of Extendicare, Inc. et al. in Supp. of Pets., *Beverly Enters., Inc. v. Ping*, No. 12-652 (U.S. Dec. 21, 2012) (same).

of federal law, which delay would force parties seeking to enforce their federal arbitration rights to endure several more years of costly litigation as courts that have not yet decided this issue struggle to do so without clear guidance from this Court.

**A. The Supreme Courts of Illinois and Texas Have Issued Conflicting Decisions on the Same Question of Federal Law**

Citing what she calls the “derivative-independent dichotomy,” the Estate Administrator attempts to explain away the direct conflict between the Supreme Court of Illinois’s interpretation of the FAA and that of the Supreme Court of Texas. Br. in Opp. 7-8 (discussing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009)). According to the Estate Administrator, the published opinions of those two state courts of last resort are not in conflict because Illinois’s wrongful-death statute falls within the “independent” category, whereas Texas’s wrongful-death statute falls within the “derivative” category. See Br. in Opp. 7-8, 10. That is incorrect.

The Supreme Court of Illinois has consistently interpreted Illinois’s wrongful-death statute as creating a derivative cause of action. See Pet. 32 (cataloging Illinois precedent from 1908 through 2008). The Supreme Court of Illinois confirmed the cause of action’s derivative nature in this case, see Pet. App. 22a-25a, as did the Estate Administrator in her briefs below.<sup>2</sup>

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<sup>2</sup> See Appellee Br. 15, *Carter v. SSC Odin Operating Co.*, No. 113204 (Ill. Apr. 23, 2012) (“It is true that pursuant to the Illinois Supreme Court’s interpretation of the Wrongful Death  
(continued)

As a result, the Supreme Court of Illinois has interpreted its statute in the exact same manner as Texas has interpreted its nearly identical statute. *See* Pet. 16 (discussing similarity in statutory language, as well as precedent in both jurisdictions enforcing settlement agreements signed by decedents). Despite that fact, the Supreme Court of Illinois rejected *Labatt*'s holding that the FAA preempts the “anomalous” rule of law adopted by the Illinois court. *See* Pet. App. 24a-25a; *see also Laizure v. Avante at Leesburg, Inc.*, --- So. 3d ---, No. SC10-2132, 2013 WL 535417, at \*8 (Fla. Feb. 14, 2013) (agreeing that the Illinois legal rule is “anomalous”).

Accordingly, the direct conflict discussed in the petition cannot be explained away in the manner suggested by the Estate Administrator. Furthermore, as explained in detail by the AHCA *Amicus* Brief (at 8-11), the derivative-independent distinction fails to provide a logical explanation for the conflicting legal rules established in this area generally. Nor can the disagreement of authority be reconciled based on differences in statutory language. For example, despite the fact that Florida, Illinois, Ohio, and Texas use virtually identical language in creating a wrongful-death cause of action,<sup>3</sup> those States'

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Act, a wrongful death claim is derivative of the decedent's right to pursue an action for personal injuries at the time of death.”); Appellee Supp. Br. 11, *Carter v. SSC Odin Operating Co.*, No. 5-07-0392 (Ill. App. Ct. Sept. 16, 2010) (repeating same).

<sup>3</sup> *See Florida*, Fla. Stat. § 768.19 (explaining such claims can only be maintained if the act causing death “would have entitled the person injured to maintain an action and recover damages if death had not ensued”); *Illinois*, 740 Ill. Comp.

(continued)

highest courts are evenly divided on whether a court can compel arbitration of a wrongful-death claim based on an arbitration agreement signed by the decedent.<sup>4</sup>

### **B. The Petition Presents an Important Issue of Federal, Not State, Law**

Apart from mischaracterizing Illinois’s wrongful-death statute as creating an “independent” cause of action, the central theme of the brief in opposition can be summarized as follows: the arbitrability of wrongful-death claims is a state-law issue beyond this Court’s purview because wrongful-death claims are creatures of state law that state courts are free to interpret as they see fit. *See* Br. in Opp. 1-3, 13, 16. That, too, is incorrect.

While it cannot be denied that our federalist system of government “permits each sovereign State to

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Stat. 180/1 (explaining such claims can only be maintained if the act causing death “is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof”); **Ohio**, Ohio Rev. Code Ann. § 2125.01 (explaining such claims can only be maintained if the act causing death “would have entitled the party injured to maintain an action and recover damages if death had not ensued”); **Texas**, Tex. Civ. Prac. & Rem. Code § 71.003(a) (explaining such claims can only be maintained “if the individual injured would have been entitled to bring an action for the injury if the individual had lived”).

<sup>4</sup> Compare **Florida**, *Laizure*, 2013 WL 535417, at \*8 (compelling arbitration of wrongful-death claim), and **Texas**, *Labatt*, 279 S.W.3d at 646 (same), with **Illinois**, Pet. App. 26a (refusing to compel arbitration of wrongful-death claim), and **Ohio**, *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007) (same).

have its own set of laws,” Br. in Opp. 8, the Supremacy Clause instructs that if those state laws conflict with the FAA, the FAA controls. Just as States are free to regulate franchise contracts,<sup>5</sup> wage disputes,<sup>6</sup> talent agents,<sup>7</sup> and arbitration agreements themselves,<sup>8</sup> the FAA displaces those state laws if they have the effect—either on their face or as interpreted—of limiting *federal* arbitration rights. If this Court’s FAA jurisprudence has taught the bench and bar anything, it is that this Court has the final say on interpreting and enforcing the FAA, such that no State may exempt a class of claims from arbitration. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) (summarily reversing state court of last resort’s erroneous ruling that state wrongful-death claims could be exempted from arbitration because arbitration agreements

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<sup>5</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (finding FAA preempted state supreme court’s interpretation of state statute governing franchise contracts).

<sup>6</sup> *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (finding FAA preempted state statute providing that suits for the collection of wages could be maintained irrespective of arbitration agreements).

<sup>7</sup> *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (finding FAA preempted state statute purporting to vest administrative agency with sole adjudicatory authority over disputes with unlicensed talent agents).

<sup>8</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (finding FAA preempted state statute conditioning enforceability of arbitration agreements on compliance with certain notice requirements).

covering such claims do not qualify for FAA protection).

The Estate Administrator also accuses the petition of having “disparage[d]” the wrongful-death jurisprudence of several States that, like Illinois, have refused to enforce arbitration agreements signed by or on behalf of decedents. Br. in Opp. 3. Respectful disagreement does not constitute disparagement. *See* Pet. 20-22. Furthermore, as Florida’s highest court recently acknowledged in its unanimous decision rejecting Illinois’s “anomalous” rule of law in a case indistinguishable from this one: “Principled arguments exist on both sides of this issue.” *Laizure*, 2013 WL 535417, at \*8. That, in turn, explains why this Court’s timely intervention is necessary. If the legal questions were easy, there likely would be no need for this Court’s guidance. However, the need for such guidance undoubtedly exists in the wrongful-death context. *See, e.g., Laizure*, 2013 WL 535417, at \*7 n.3 (acknowledging nationwide disagreement of authority on arbitrability of wrongful-death claims); Pet. App. 24a (same); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 598 (Ky. 2012) (same); *Labatt*, 279 S.W.3d at 646-47 (same).

The Estate Administrator also claims (Br. in Opp. 10) that the petition “asks this Court to force all of these States to change the nature of their wrongful death claims to align with those” of States that have compelled arbitration under circumstances identical to this case. The petition seeks no such relief. Instead, the petition merely asks the Court to enforce the FAA’s clear command that States must place arbitration agreements on equal footing with other contracts. Pet. 29. Illinois has refused to do so in the

context of arbitration agreements signed by decedents. Tellingly, the Estate Administrator makes no effort to explain how Illinois’s anomalous legal rule—enforcing settlement agreements signed by decedents that discharge wrongful-death claims completely, but refusing to enforce arbitration agreements signed by decedents that merely specify where such claims must be litigated—can be reconciled with the FAA. As the Supreme Court of Texas correctly held, the FAA preempts such an anomalous legal rule. *Labatt*, 279 S.W.3d at 646.<sup>9</sup>

**C. The Estate Administrator Concedes That This Case Provides an Ideal Vehicle In Which to Resolve the Wrongful-Death Issue, Which Has Nationwide Importance**

The petition explained (at 22-24) that the arbitrability of wrongful-death claims is a question of national importance affecting the entire health care industry and employers generally. As demonstrated by the participation of *amici* supporting review in this case, the petition’s assertions are well founded. *See, e.g., AHCA Amicus* Br. 18 (explaining that the wrongful-death issue cuts across industry lines); Def.

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<sup>9</sup> The Estate Administrator repeatedly cites the fact that the Supreme Court of Illinois has held that wrongful-death claims “belong” to the wrongful-death beneficiaries, not the decedent. Br. in Opp. 1, 2, 4, 7, 10. Even if that were correct, it cannot explain Illinois’s disparate treatment of arbitration agreements signed by decedents since Illinois enforces settlement agreements signed by decedents that discharge wrongful-death claims completely. In other words, if a wrongful-death claim truly “belonged” to the wrongful-death beneficiaries, any release signed by the decedent would be ineffective.

Counsel *Amicus* Br. 6 (discussing the “web of different and inconsistent rules” that presently exist with respect to arbitration in the wrongful-death context). The Estate Administrator provides no argument to the contrary.

Similarly, the Estate Administrator does not challenge the petition’s explanation (at 25-28) that this case provides an ideal vehicle in which to resolve the question presented. It is unlikely that any future case will present the wrongful-death issue in such a pristine fashion as does this one, where six years of hard-fought litigation have resolved all of the antecedent legal issues that often complicate review of the wrongful-death issue. Accordingly, the Court should take this opportunity to provide much-needed guidance on the FAA’s preemptive effect in the wrongful-death context.

\* \* \* \* \*

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari and the briefs of *amici*, the Court should grant the petition.

Respectfully submitted.

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