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 Writ of Certiorari to the
Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Federal Arbitration Act require Illinois and other States to interpret their wrongful death statutes and principles of contract law in such a manner that a decedent's waiver of her right to sue in court binds her heirs who were not parties to the waiver?

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INTRODUCTION

In this case, the Illinois Supreme Court enforced an arbitration agreement against the now-deceased nursing home resident who entered into it, but not against a non-party to the agreement asserting her own independent claim for the decedent's wrongful death. That unremarkable decision, which rests on state-law principles governing the circumstances in which a decedent's contract binds third parties, in no way conflicts with the Federal Arbitration Act (FAA), which relies on state law to determine what parties are bound by arbitration agreements.

Petitioner has mistaken a commonplace difference in the operation of different states' laws for a conflict of opinions regarding federal arbitration law. Like countless other matters of state law, wrongful death is a cause of action that operates differently in different states. In some states, like Texas and Michigan, a wrongful death cause of action is wholly derivative of a decedent's personal injury claims. In other states, like Ohio and Utah — and Illinois, as held in the decision below — a wrongful death cause of action belongs to a decedent's heirs. This difference in various states' laws leads to differences in the ability of decedents to bind their heirs with respect to wrongful death claims. These differences are a matter of state substantive law — specifically, a matter of the interplay between the nature of state wrongful death claims and principles of state contract law.

State laws under which wrongful death claims belong to the heirs do not run afoul of the FAA because they do not create rules that "apply only to arbitration or that derive their meaning from the fact

that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). The FAA does not preempt arbitration-neutral rules such as the rule of Illinois (and many of its sister states) that a wrongful death claim belongs to the decedent's heirs to compensate them independently for their own losses stemming from the death of the decedent.

Contrary to Petitioner's assertion, not every state law that incidentally makes binding arbitration more difficult to achieve is preempted by the FAA. Rather, the FAA roots out rules of law that place arbitration on an unequal footing, such as a state-court decision announcing a broad anti-arbitration policy that prohibits the parties to a contract from agreeing to arbitrate a particular type of claim that may arise between them. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam). Here, by contrast, the Illinois Supreme Court has issued a decision that is even-handed with respect to arbitration — of Respondent's two claims arising from her mother's death, the Illinois Supreme Court required one to be arbitrated and permitted the other to be litigated. The difference was not based on a special rule regarding arbitration; rather, it was based on a general rule regarding the ability of a person to enter into contracts that are binding on third parties who may eventually assert wrongful death claims under Illinois law. There is no conflict of federal law implicated here, only a difference in the substantive laws of several States.

Thus, the Petition asks this Court to extend beyond its role as an enforcer of federal law and to take a substantive role in reshaping to Petitioner's liking the laws of a sovereign State. In fact,

Petitioner disparages the substantive wrongful death jurisprudence not only of Illinois in the decision below but also the wrongful death jurisprudence of the States of Georgia, Kentucky, Massachusetts, Missouri, Ohio, Oklahoma, and Washington. This Court should decline Petitioner's invitation to rewrite the substance of state laws. The Petition should be denied.

STATEMENT OF THE CASE

After her mother Joyce Gott died in the care of a nursing home Petitioner operated, Respondent Sue Carter, as administrator of her mother's estate, sued Petitioner for its role in the gastrointestinal bleeding, anemia, and respiratory failure that led to Gott's death. Pet. App. 2a-3a, 70a-71a. The complaint asserted two claims, a survival action for Gott's own injuries resulting from Petitioner's violation of the state Nursing Home Care Act, *see id.* at 2a-3a, 70a, and a claim under the state Wrongful Death Act for the injury to Gott's heirs as a result of her death, *see id.* at 3a, 71a.

Petitioner moved to compel arbitration on the basis of an agreement Gott had signed on each of the two occasions she was admitted to the nursing home, first in 2005 via Carter as her legal representative, then again in 2006 by Gott herself. *Id.* at 3a. The trial court denied the motion on a variety of grounds, and the appellate court affirmed the denial on the basis of provisions of the state Nursing Home Care Act prohibiting the waiver of the right to a jury trial. *Id.* at 4a. The Illinois Supreme Court reversed, citing this Court's FAA jurisprudence and holding that the anti-waiver provisions of the state statute were the

functional equivalent of anti-arbitration legislation and therefore preempted by the FAA. *Id.* at 5a.

On remand, the appellate court reaffirmed on two grounds the denial of the motion to compel arbitration. First, the appellate court held that the entire arbitration agreement was void for lack of mutuality of obligation, because the arbitration agreement applied only to claims worth at least $200,000 and therefore would apply only to claims Gott might have against the nursing home, and not any claims by the nursing home against Gott. *Id.* Second, the appellate court held that even if the arbitration agreement were valid, it could not be enforced with respect to the wrongful death claim, because Carter had not signed the agreement in her individual capacity, and it was therefore not binding on her, only her mother. *Id.* at 6a.

In a unanimous opinion, the Illinois Supreme Court reversed in part and affirmed in part. The court rejected the contract defense of lack of mutuality, holding that the arbitration agreement was supported by consideration, even if that consideration was not a reciprocal promise. *Id.* at 12a. However, the court affirmed the appellate court's ruling on Carter's wrongful death claim, ruling that a claim under the Illinois Wrongful Death Act, unlike a survival action under state law, belongs to the decedent's heirs personally, rather than as stand-ins for the decedent, because it is intended to compensate the heirs for their own losses. *See id.* at 14a-17a, 26a-27a.

Unlike a survival action, the court noted, a wrongful death claim is not treated as part of the decedent's estate for the purpose of probate. *Id.* at

18a. Additionally, the court explained that although a wrongful death claim is in some sense "derivative" of the decedent's rights insofar as its existence depends on whether the decedent would have had a personal injury claim, *see id.* at 23a-24a, the contingent nature of the action does not "provide[] a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement." *Id.* at 25a. Because arbitration is generally a matter of contract that requires consent, and because only Gott — not Carter in her individual capacity — agreed to arbitrate claims against the nursing home, the court concluded that arbitration could be compelled "only to the extent that plaintiff is acting in Gott's stead." *Id.* at 26a.

The court held that the claim brought pursuant to the Illinois survival statute was brought in Gott's stead, because it accrued prior to Gott's death and is by nature brought for the benefit of her estate. *Id.* However, because the wrongful death claim did not accrue until Gott's death and is by nature brought for the benefit of the next of kin and not the estate, the court held that as a matter of Illinois statutory law, Carter is not acting in Gott's stead for the purpose of the wrongful death claim and therefore cannot be bound to an arbitration agreement to which she was not a party. *Id.* at 26a-27a.

REASONS FOR DENYING THE WRIT

I. The Difference In The Nature Of The Wrongful Death Cause Of Action In Different States Does Not Present A Conflict Of Federal Law.

The FAA makes contracts to arbitrate enforceable, subject to generally-applicable principles

of state law. *See* 9 U.S.C. § 2. State policies that place agreements to arbitrate on unequal footing are preempted by the FAA, but in the absence of a rule that disfavors arbitration, arbitration-neutral principles of state law generally determine who is bound by a contract, including the circumstances under which non-parties to an agreement, such as Carter, may be bound to its terms. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009). This case is about a straightforward application of one such arbitration-neutral state law, the Illinois Wrongful Death Act.

Petitioner's argument for certiorari rests on a faulty premise: that courts throughout the country "have given conflicting answers to [an] important question of federal law under substantially identical circumstances." Pet. 5. The difference of opinion Petitioner has identified is not a difference regarding a "question of federal law" at all. Rather, it is a difference in the way the various States have chosen to interpret and apply their own state-law wrongful death causes of action.

"A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'" *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)) (alteration in *Riley*). As the Texas Supreme Court explained in a decision on which Petitioner principally relies, the issue whether a decedent's arbitration agreement applies to a wrongful death action has come out different ways in different states not based on varying degrees of hostility to arbitration but rather "based on whether the wrongful death action is an independent or derivative cause of action under state

law." *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 646 (Tex. 2009). The Kentucky Supreme Court, writing recently in a case that Petitioner asserts conflicts with the Texas decision, *see* Pet. 20-21, characterizes the legal landscape in similar terms:

> Courts in states where the wrongful death action is derivative have held that an arbitration agreement applicable to a personal injury claim applies as well to the wrongful death claim. Where the claims are deemed independent, however, courts have held that a person's agreement to arbitrate his or her personal injury claim does not bind the wrongful death claimants to arbitration, because they were not parties to the agreement and do not derive their claim from a party.

Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 598 (Ky. 2012) (citations omitted), *pet. for cert. pending*, No. 12-652 (filed Nov. 20, 2012).

Thus, courts across the spectrum of wrongful death jurisprudence agree that the issue is one of state law. In some states, a wrongful death cause of action is entirely "derivative" of a decedent's claim and therefore subject to whatever constraints the decedent places on that claim by contract, whereas in other states, a wrongful death cause of action is "independent," belonging to the heirs rather than the decedent, and therefore may not be so readily limited ex ante by the decedent. *See generally Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration] Act is a matter of consent."). That Illinois is an example of

the latter category and Texas the former is not a conflict of federal law; it is the essence of federalism itself, which permits each sovereign State to have its own set of laws.[1]

To be sure, the independent-derivative dichotomy does not perfectly predict whether a decedent can bind her heirs to arbitrate a wrongful death claim, because some states enforce arbitration agreements in this context *more* broadly than the FAA and generally applicable principles of contract law would otherwise require. California recognizes a wrongful death claim that, like an Illinois wrongful death claim, is "independent," yet because of a different California statute that specifically authorizes and defines the scope of arbitration agreements involving health care providers, wrongful death claims in that State can be subject to binding arbitration agreements made by the decedent prior to her death. *See Ruiz v. Podolsky*, 237 P.3d 584, 587-88, 591-92 (Cal. 2010) (applying Cal. Civ. Pro. Code § 1295). Colorado characterizes its wrongful death claim as "separate and distinct from a cause of action the deceased could have maintained had he survived," *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo. 2003), but nonetheless held that a decedent's agreement to

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[1] It should be noted that many of the state decisions use both the term "derivative" and the term "independent" to describe various aspects of their wrongful death laws; Respondent uses these terms, as did the highest courts of Kentucky and Texas, simply as shorthand to generalize about two prevailing trends in state wrongful death law. What matters, ultimately, is not the labels used, but that each State has its own wrongful death jurisprudence that does not single out arbitration for disfavored treatment.

arbitrate applied to his heir's wrongful death claim because of Colorado's unusually strong presumption in favor of arbitration, which must be compelled "unless [a court] can say 'with positive assurance' that the arbitration clause is not susceptible of any interpretation that encompasses the subject matter of the dispute." *Id.* at 378 (citation omitted); *see also id.* at 381 (applying the strong presumption to the question of which parties an arbitration agreement binds). These particular features of California and Colorado law are, like the broader independent-derivative dichotomy, properly a matter of state law and not a source of conflict regarding federal law. The FAA does not bar states from enforcing arbitration agreements more broadly than the FAA itself would require. *See*, *e.g.*, *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595-96 (3d Cir. 2004).

Amici American Health Care Association et al. mischaracterize *Entrekin v. Internal Medicine Associates of Dothan, P.A.*, 689 F.3d 1248, 1253-54 (11th Cir. 2012), as holding that the FAA requires arbitration of Alabama wrongful death claims even though Alabama considers such actions "independent." *See* Amicus Br. of Am. Health Care Ass'n et al. 10-11. But the "separate and independent" language amici attribute to the Eleventh Circuit's opinion, *see id.* at 11, nowhere appears in *Entrekin*. Moreover, the court in *Entrekin* explicitly recognized that whether a contract entered into by a decedent binds third parties asserting wrongful death claims is *a matter of state law*: the court characterized the question whether the arbitration agreement bound the wrongful death claimant as "the Alabama law issue at the heart of this case." 689 F.3d at 1253. Consistently with that

view, the court followed Alabama state court decisions in determining the extent to which a decedent's agreement can bind wrongful death claimants. *Id.* at 1254-59. *Entrekin* thus confirms that the issue here is entirely one of state law.

As the Petition notes, the States of Kentucky, Missouri, Ohio, Utah, and Washington, like Illinois, all recognize "independent" wrongful death causes of action, and federal courts have projected that the wrongful death laws in the States of Georgia and Massachusetts do as well. *See* Pet. 21-22. Petitioner asks this Court to force all of these States to change the nature of their wrongful death claims to align with those of Alabama, Florida, Indiana, Michigan, Mississippi, and Texas, because it happens to be easier for a decedent to bind her heirs to arbitrate a wrongful death claim in the latter group. *See id.* at 18-19 (listing state decisions that recognize "derivative" claims).

But the Federal Arbitration Act provides that questions about who will be bound by arbitration agreements are answered by state law, *see Arthur Andersen*, 556 U.S. at 630-31, and the FAA preserves generally-applicable laws that do not single out arbitration for disfavored treatment, *see Concepcion*, 131 S. Ct. at 1746 (explaining that the FAA's "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability" (citation and internal quotation marks omitted)). The FAA thus does not preempt arbitration-neutral rules, such as the rule of Illinois and several other states that a wrongful death claim belongs to the decedent's heirs.

That the nature of a wrongful death claim in Illinois generally does not allow a decedent to bind her heirs with respect to arbitration and other procedural matters concerning that particular type of claim, does not make this rule of law itself discriminatory or place arbitration on unequal footing. Had Gott signed an agreement that required any lawsuit against Petitioner to be filed in a particular venue (say, Marion County, Illinois), that limitation too would be unenforceable against Gott's heirs in a wrongful death action. And nothing in the decision below suggests that a wrongful death claim would not be subject to arbitration if the heirs themselves had signed a pre-dispute arbitrarion agreement on their own behalf. Thus, the decision does not single out a particular type of claim for exclusion from arbitration. The decision holds only that the decedent cannot bind her heirs to arbitrate the claim because it is not the decedent's claim in the first place.

Petitioner invites this Court to delve even further into Illinois substantive law by claiming that the decision below conflicts with other Illinois decisions recognizing that wrongful death actions cannot be maintained if the underlying personal injury claim has been settled, released, or subject to a judgment. *See* Pet. 28-29. But the Illinois Supreme Court harmonized its decision in this case with the prior decisions Petitioner cites, distinguishing between acts of the decedent that go to the very *existence* of the underlying personal injury claim that is the basis for the wrongful death claim, and contracts regarding ancillary matters concerning the wrongful death claim. *See* Pet. App. 23a-25a; *see also Bybee v. Abdulla*, 189 P.3d 40, 44 (Utah 2008) (noting that

permitting a wrongful death action after the underlying personal injury claim was adjudicated or settled could lead to double recovery). At a more basic level, Petitioner's criticism of the Illinois Supreme Court's wrongful death jurisprudence is misplaced here because it is not this Court's role to iron out any alleged kinks in the decisions of Illinois courts on matters of Illinois law.

The policy arguments of Petitioner's amici provide no basis for this Court to displace state laws that do not conform to amici's policy preferences. Amici Association of Southern California Defense Counsel et al. extol the California statute that creates a special rule making health care arbitration agreements binding on third parties. *See* Amicus Br. of Ass'n of S. Cal. Defense Counsel et al. 7-11. Amici's preference for California's statute over the law of Illinois underscores a fundamental misconception shared by Petitioner and its amici: they assume that it is this Court's role to impose a uniform wrongful death rule, rather than leaving the States free to apply their own laws so long as they are arbitration-neutral. Of course, Illinois is free to adopt the California rule if it chooses, but such innovations generally require legislative action. Amici's concerns are properly expressed to the Illinois legislature, not to this Court.

Amici American Health Care Association et al. raise the specter of a division of authority about whether federal or state law (and which state law) governs the arbitrability of wrongful death claims, but amici themselves point to no decisions squarely in conflict — only decisions applying state law on the one hand, and decisions that decline to decide on the other hand. *See* Amicus Br. of Am. Health Care Ass'n

et al. 13-14. Moreover, Petitioner itself has not raised the choice-of-law question, so this case would be a poor vehicle for resolving any such claimed conflict.

In sum, there is no conflict about the interpretation of federal law, only an ordinary and permissible difference in the operation of the laws of various States. And there is no reason to disturb the substantive laws of at least eight sovereign States by imposing a uniform federal definition of the wrongful death cause of action. Review is therefore unwarranted.[2]

II. The Decision Below Does Not Contravene The FAA Or This Court's Arbitration Jurisprudence.

Petitioner wrongly likens the decision below to the decision of the West Virginia Supreme Court that this Court summarily reversed in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam). The comparison is specious.

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[2] This Court should reject Petitioner's suggestion that this case be consolidated with *Ping*, No. 12-652. The petition in that case raises two issues. One is substantially the same as the sole issue raised in this case, but under Kentucky law. As explained above, this issue is a matter of state law on which review is unwarranted. The other issue presented in *Ping* is whether a particular power of attorney granted the agent authority to agree to binding arbitration. That issue is not presented here, because the Illinois Supreme Court held that Gott's arbitration agreement, signed in one instance by her legal representative and in a second instance by Gott herself, *was* effective with respect to Gott's own claims. Even if that issue merited review, it would provide no basis for review of this case. Because the only issue this case shares with *Ping* is not worthy of certiorari, review here should be promptly denied without regard to *Ping*.

After this Court held in *Concepcion* that state rules of public policy disfavoring arbitration were preempted by the FAA, the West Virginia Supreme Court adopted just such a rule. *See Marmet*, 132 S. Ct. at 1203. This Court's summary reversal merely reiterated and reapplied *Concepcion* to reverse a blanket public-policy rule forbidding arbitration agreements that covered any personal injury or wrongful death claim against a nursing home. *See id.* at 1203-04. The fact that the case involved a wrongful death claim was not at all material to this Court's decision, which was based on *Concepcion*'s statement that "'[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.'" *Id.* at 1203 (quoting *Concepcion*, 131 S. Ct. at 1747) (alterations in *Marmet*).

The decision below does not conflict with *Marmet*. In fact, any suggestion that the decision below reflects hostility to arbitration is belied by Illinois Supreme Court's decision to *compel* arbitration with respect to the survivorship claim (thus partially reversing the decision of the intermediate state appellate court, which had refused to compel arbitration on any aspect of the case). *See* Pet. App. 5a-6a, 26a, 28a. The Illinois Supreme Court carefully parsed the two claims at issue, analyzed the nature of each under state law, and in a nuanced opinion sent one to arbitration and one to litigation — hardly

the result one would expect from a court with an anti-arbitration bias.[3]

Petitioner's suggestion (at Pet. 29-31) that the Illinois Supreme Court's citation of this Court's general observation that "a contract cannot bind a nonparty," Pet. App. 26a (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)), ran afoul of this Court's decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), is doubly misguided. First, *Waffle House* and *Arthur Andersen* are consistent. In the former case, the Court did not require arbitration because of the general rule that contracts usually do not bind third parties. *See Waffle House*, 534 U.S. at 297-98. In the latter case, the Court recognized that there are certain circumstances under which a contract *can* bind a third party and held that under such circumstances, an agreement to arbitrate, no less than other types of agreements, will be enforced against the third party. *See Arthur Andersen*, 556 U.S. at 631. *Arthur Andersen* distinguished *Waffle House* without any suggestion that the earlier case was overruled. *See id.* at 632.

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[3] Amici American Health Care Association et al. express concern regarding the possibility of bifurcated proceedings, *see* Amicus Br. of Am. Health Care Ass'n et al. 19-21, but this Court has explained that "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam). Moreover, this Court has never suggested that nonparties may be bound to an arbitration agreement contrary to principles of state contract law merely to save a party from the inconvenience of being subject to different forums for the resolution of a dispute.

Second, and more fundamentally, the degree to which a state allows third parties to be bound by a contract is a matter of state contract law — as *Arthur Andersen* itself recognized. *See id.* at 630 (explaining that the FAA does not "purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)"). Thus, the Illinois Supreme Court's decision to apply the general legal truism noted in *Waffle House* to the circumstances of a wrongful death action as a matter of Illinois contract law in the context of the Illinois wrongful death statute is a matter for the Illinois Supreme Court. Petitioner's contention that the decision below somehow contravened *Arthur Andersen* is mistaken. The decision below properly applied this Court's FAA jurisprudence in light of the nature of the state law claims at issue.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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