
COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

NO. SJC-12714

**GGNSC CHESTNUT HILL, LLC, d/b/a GOLDEN LIVING CENTER
HEATHWOOD; GGNSC ADMINISTRATIVE SERVICES LLC; GOLDEN
GATE NATIONAL SENIOR CARE, LLC; GGNSC HOLDINGS LLC,**

Plaintiffs-Appellees,

v.

**JACKALYN M. SCHRADER, AS THE REPRESENTATIVE OF THE
ESTATE OF EMMA J. SCHRADER,**

Defendant-Appellant.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF OF AARP, AARP FOUNDATION, THE NATIONAL CONSUMER
VOICE FOR QUALITY LONG-TERM CARE, JUSTICE IN AGING, THE
CENTER FOR PUBLIC REPRESENTATION, AND THE NATIONAL
ACADEMY OF ELDER LAW ATTORNEYS AS AMICI CURIAE
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CORPORATE DISCLOSURE STATEMENTS

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act. Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

The Internal Revenue Service has determined that the National Academy of Elder Law Attorneys (“NAELA”) and the Massachusetts Chapter of NAELA (“MassNAELA”) are each organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(6) of the Internal Revenue Code and are exempt from income tax. NAELA is organized and operated as a nonprofit corporation under Oregon law. MassNAELA is organized and operated as a

nonprofit corporation under Massachusetts law. Neither NAELA nor MassNAELA has a parent corporation, nor has either issued shares or securities.

The Internal Revenue Service has determined that the National Consumer Voice for Quality Long-Term Care is organized and operated exclusively for charitable purpose pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. The Consumer Voice is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code (1951). It has no parent corporation, nor has it issued shares or securities.

Pursuant to Supreme Judicial Court Rule 1:21, amicus curiae Center for Public Representation states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publically held corporation that issues stock. It has no parent corporation.

Justice in Aging is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

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STATEMENTS OF INTEREST¹

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and fight for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation fight to protect the rights of nursing facility residents to obtain judicial redress when they have been victims of neglect or abuse. AARP and AARP Foundation have filed amicus briefs in many state and federal cases that challenged the enforceability of pre-dispute arbitration clauses in long-term care, consumer, and employment contracts. *See, e.g., Kindred Nursing Ctrs Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *Taylor v. Extendicare Health Facilities, Inc.*, 637 Pa. 163, 147 A.3d 490 (Penn. 2015);

¹ No counsel for the parties authored this brief, in whole or in part. No counsel or party, or any other entity or person, made a monetary contribution intended to fund the preparation or submittal of this brief. The amici curiae and their counsel do not represent and have not represented any of the parties to the present appeal in another proceeding involving similar issues. Amici curiae also did not represent a party or serve as a party in a proceeding or legal transaction that is at issue in the present appeal.

Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752 (Fla. 2013); *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, 304 P.3d 409 (N.M. 2013).

Justice in Aging is a national, nonprofit law organization that uses the power of law to fight senior poverty through securing access to affordable health care, economic security, and the courts for older adults with limited resources. Justice in Aging conducts training and advocacy regarding nursing facility issues, and provides technical assistance to attorneys and other advocates from across the country on how to address problems arising in nursing facilities. Justice in Aging publishes and updates the advocacy guide, *25 Common Nursing Home Problems — and How to Resolve Them*, which has been downloaded thousands of times from the Justice in Aging website. Justice in Aging frequently appears as friend of the court on cases involving health care access for older Americans; recent appearances include *Stewart v. Azar I*, 313 F. Supp. 3d 237 (D.D.C. 2018), *Stewart v. Azar II*, 366 F. Supp. 3d 125 (D.D.C. 2019), and *Philbrick v. Azar*, 2019 WL 3414376, 2019 U.S. Dist. LEXIS 125675 (D.D.C. 2019).

The National Academy of Elder Law Attorneys, Inc. (“NAELA”) is a national professional association of about 4,500 attorneys dedicated to improving the quality of legal services provided to seniors and people with special needs. The Massachusetts Chapter of NAELA (“MassNAELA”) has 450 members and is the leading organization of elder law professionals in the state. Elder law has

developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities. MassNAELA members assist their clients with planning for incapacity, long-term care, Medicaid and Medicare coverage, health and long-term care insurance, and health care decision-making, among other issues, and advocate for the rights of long-term care residents.

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) is a national nonprofit consumer advocacy organization founded in 1975 due to public concern about substandard care in nursing facilities. The Consumer Voice is the leading national voice representing consumers in issues relating to long-term care and is the primary source of information and tools for consumers, families, caregivers, ombudsmen, and other advocates to help ensure quality care for all residents. The Consumer Voice is dedicated to advocating for quality care, quality of life, and protection of rights for all individuals receiving long-term care, services, and supports.

The Center for Public Representation (CPR) is a public interest law firm that has been assisting people with disabilities for more than forty years. It is both a statewide and national legal backup center that provides assistance and support to public and private attorneys who represent people with disabilities in Massachusetts, and to the federally-funded protection and advocacy agencies in each of the fifty States. It has litigated systemic cases on behalf of person with

disabilities in more than twenty states, and authored amici briefs to the United States Supreme Court and many courts of appeals, in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the ADA. Currently, CPR represents over 12,000 persons with intellectual and developmental disabilities or acquired brain injuries who are residents of nursing facilities in Massachusetts, as part of two federal class action cases.

SUMMARY OF THE ARGUMENT

It is never an easy decision to move a loved one to a nursing facility. The difficulty of this initial choice—often made in the midst of a health-related or caregiver crisis—is equally matched by the difficulty of contemplating disputes that may later arise between the resident or her family and the nursing facility. This is especially true for those conflicts that result from abuse, assault, malnutrition, or neglect. No family member wants or expects their loved one to experience any of these horrible outcomes. They certainly do not expect it to come at the hands of the nursing facility entrusted to ensure the well-being and safety of its residents.

Unfortunately, abuse and neglect in nursing facilities is pervasive, and regulatory agencies are unable to adequately protect residents from harm. Confidential arbitration prevents the public from accessing critical information about the quality of care – or lack thereof – provided in nursing facilities. Not only is such information helpful to consumers making decisions about where their family members will live, but it is also critical to advocates who seek to ensure that nursing facility residents are treated with the level of respect and dignity they deserve.

In circumstances like this case, where abuse or neglect are alleged to have caused the death of a loved one, the resident's surviving family members and other heirs must make yet another difficult decision: whether to file a suit for wrongful

death. As described herein, Massachusetts law supports a holding that family members who file such suits are not bound by arbitration provisions in agreements between the nursing facility and the deceased resident, because these types of claims are independent, not derivative. This result is consistent with Supreme Court precedent holding that “a court may order arbitration of a particular dispute only when satisfied that the parties agreed to arbitrate *that dispute*.” *Granite Rock Co. v. Int’l Bhd. Of Teamsters*, 561 U.S. 287, 288 (2010) (emphasis in original), and with courts in several other states.

ARGUMENT

I. ARBITRATION AGREEMENTS ARE OFTEN PRESENTED DURING TIMES OF DISTRESS.

The nursing home admission process can be profoundly stressful for both the resident and the resident’s family. Even well-informed and sophisticated consumers are often ill-prepared to navigate the maze of the admission process. The resident and her family members are often in a state of emotional and physical vulnerability at the point of nursing home placement. Family have often been acting as caregivers for a frail elder, or are under pressure from hospital discharge planners to find a nursing home bed immediately. *See* Marshall B. Kapp, *The “Voluntary” Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 New Eng. J. on Crim. & Civ. Confinement 1, 3 (1998) (explaining that an older person’s move to a nursing facility often follows a

period of acute hospitalization when she and/or her family cannot manage the care demands at home). The need to find a long-term care placement arises quickly and often is unplanned, leaving little time to investigate options or to wait for an opening at a facility of one's choice. Denese Ashbaugh Vlosky, et al., "Say-so" As A Predictor of Nursing Home Readiness, 93 J. of Fam. & Consumer Scis. 59 (2001).

It is in this context that residents and family members are handed an admission package (including an arbitration agreement) and directed to "sign here and here and here" with little opportunity for explanation or negotiation. *Podolsky v. First Healthcare Corporation*, 58 Cal. Rptr. 2d 89, 92-94 (Cal. App. 2 Dist. 1996) (citing examples of admissions practices and acknowledging that a nursing home admission "is often an emotionally-charged, stress-laden event"); *see also* Maureen Armour, *A Nursing Home's Good Faith Duty "To" Care: Redefining a Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 225-26 (1994) (describing the "voluminous" admission documents that families are asked to sign). Arbitration agreements are often buried in these stacks. *See* Ann E. Krasuski, *Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents*, 8 DePaul J. Health Care L. 263, 263-64 (2004) (describing reasons why arbitration agreements go unnoticed when admission documents are signed).

II. ACCESS TO COURTS IS CRITICAL TO COMBAT ABUSE AND NEGLECT IN NURSING FACILITIES

Elder abuse and neglect remain pervasive in nursing facilities throughout the United States, including in Massachusetts. The Federal and State enforcement scheme designed to penalize perpetrators and deter wrongful conduct have failed to effectively detect and remedy this problem. Maintaining the right of beneficiaries to publicly litigate disputes when a loved one has died at the hands of a nursing facility is critical to filling the void left by a lack of enforcement activity. Forcing next of kin to arbitrate wrongful death suits removes a critical source of information about quality of care in nursing facilities that helps consumers to make informed choices, and allows resident advocates to ensure humane treatment of residents.

A. Nursing Facility Residents Suffer From High Rates of Abuse and Neglect.

Nursing facility residents are highly vulnerable to abuse and neglect because they are dependent on others to perform activities of daily living, and they are often isolated from their social networks. *See* Kjersti Lisbeth Braaten and Wenche Malmedal, *Preventing Physical Abuse of Nursing Home Residents- As Seen From the Nursing Staff's Perspective*, *Nursing Open* (2017), <https://doi.org/10.1002/nop2.98>. In 2016, one in five high-risk Medicare claims for emergency room visits of beneficiaries living in a skilled nursing facility were the result of potential abuse

or neglect. OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., A-01-16-00509, INCIDENTS OF POTENTIAL ABUSE AND NEGLECT AT SKILLED NURSING FACILITIES WERE NOT ALWAYS REPORTED AND INVESTIGATED, 7 (2019). In 2014, 44% of nursing facility residents surveyed said that they had personally been abused, 95% said that they had been neglected or had witnessed neglect of another resident. See Richard Weinmeyer, *Statutes to Combat Elder Abuse in Nursing Homes*, 16 AMA J. OF ETHICS 359, 360 (2014), <https://journalofethics.ama-assn.org/article/statutes-combat-elder-abuse-nursing-homes/2014-05>. Nursing facility staff corroborate the high levels of elder abuse, with over 50% admitting to subjecting older patients to physical violence, mental abuse, or neglect. See Merav Ben Natan & Ariela Lowenstein, *Study of Factors That Affect Abuse of Older People in Nursing Homes*, 17 J. NURSING MGMT. 20, 22 (2010).

In Massachusetts, there were 9,800 confirmed abuse and neglect cases in 2017, an increase of nearly 40% since 2015. Paul Singer, *New National Data Shows 'Crisis' Of Elder Abuse*, WGBH News, (May 7, 2018), <https://www.wgbh.org/news/national-news/2018/05/07/new-national-data-shows-crisis-of-elder-abuse>. Sometimes, staff act with such impunity that they are caught on camera victimizing residents. For example, in 2017, a hidden camera recorded two aides physically abusing a 93-year-old living in a Massachusetts nursing facility.

Fox25Boston.com, *Hidden camera catches nursing aides allegedly abusing 93-year old woman*, WFTV9, (Mar. 16, 2017; 11:00 AM), <https://www.wftv.com/news/trending-now/hidden-camera-catches-nursing-aides-allegedly-abusing-93year-old-woman/503535641>.

The complex challenge of collecting accurate data on the prevalence of abuse in nursing facilities means that these numbers, though shockingly high, are likely the tip of the iceberg for this largely under-detected and under-reported problem. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., A-01-17-00504, EARLY ALERT: THE CENTERS FOR MEDICARE & MEDICAID SERVICES HAS INADEQUATE PROCEDURES TO ENSURE THAT INCIDENTS OF POTENTIAL ABUSE OR NEGLECT AT SKILLED NURSING FACILITIES ARE IDENTIFIED AND REPORTED IN ACCORDANCE WITH APPLICABLE REQUIREMENTS 5-7 (2017).

B. Federal and State Enforcement Efforts Aimed at Addressing Abuse and Neglect in Nursing Facilities Have Been Inadequate to Protect Vulnerable Residents.

Despite the mandatory nature of minimum standards of care provided in the federal nursing facility laws,² many facilities fail to comply. In 2016, over one in five U.S. nursing facilities received a deficiency citation for causing actual harm or jeopardy to residents. *See* Charlene Harrington et al., Kaiser Family Found., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009*

² 42 U.S.C. §§ 1395i-3, 1396r (2017); 42 C.F.R. §§ 483.1-75 (2017).

Through 2016, 4 (Apr. 3, 2018), <https://www.kff.org/45f0273/>. Notably, this statistic has not improved over the course of the past decade. In 2006, “almost 1 in 5 nursing homes nationwide... were cited for serious deficiencies.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO07-794T, NURSING HOME REFORM: CONTINUED ATTENTION IS NEEDED TO IMPROVE QUALITY OF CARE IN SMALL BUT SIGNIFICANT SHARE OF HOMES (MAY 2, 2007), <https://www.gao.gov/assets/120/116452.pdf>. Furthermore, even after being cited by regulators, nursing facilities continue practices that harm their residents. *See, e.g.*, Ctrs. For Medicare & Medicaid Servs., U.S. Dep’t Of Health & Human Servs., *Special Focus Facilities (SFF) Initiative*, 1 (Oct. 18, 2018), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/SFFList.pdf>.

C. Arbitration Conceals the Continuous Culture of Abuse and Neglect in Nursing Facilities.

Litigation is a vital tool for residents and their families to hold nursing facilities accountable for abuse and neglect. *See* Charlene Harrington and Toby S. Edelman, *Failure to Meet Nurse Staffing Standards: A Litigation Case Study of a Large US Nursing Home Chain*, (July 20, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6055099/>. The right to bring a claim in a public court of law is essential to maintaining transparency about what occurs in nursing facilities. *See* Alexandra D. Lahav, *Article & Essay: The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683-1690 (2016) (“At least some measure of

transparency is a social good, necessary not only for individual well-being but also for the successful functioning of a democratic society. Litigation can bring to light vital information that would otherwise remain hidden[.]”). The secret nature of arbitration, however, prevents information about what often goes wrong in nursing facilities from ever reaching the public eye, precluding consumers from making fully informed choices about which nursing facilities could be dangerous.

The Center for Medicare & Medicaid Services (CMS) lists “Enhance[ing] Consumer Awareness and Assistance” as their first Principle of Action in their 2016-2017 Nursing Home Action Plan. Center for Medicare & Medicaid Services *CMS Survey and Certification Group 2016/2017 Nursing Home Action Plan: Action Plan for Further Improvement of Nursing Home Quality*, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/2016-2017-Nursing-Home-Action-Plan.pdf>. CMS observed, “[c]onsumers are essential participants in ensuring the quality of care in any health care system. The availability of relevant, timely information can significantly assist consumers with actively managing their own care.” *Id.* at iv. When wrongful death claims are sent to confidential arbitration, access to “relevant, timely information” is completely cut off.

In light of the prevalence and severity of abuse and neglect in nursing facilities, and the inability or unwillingness of regulators to enforce quality of care

standards effectively, nursing facility residents and their survivors must be able to use every tool available to them to hold facilities accountable, including litigation in open court.

III. A THIRD PARTY CANNOT BE COMPELLED TO ARBITRATE HER INDEPENDENT CLAIM.

Under the Federal Arbitration Act (FAA), an arbitration agreement is only enforceable if it complies with state contract or equity law. 9 U.S.C. § 2. It is axiomatic that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648-9 (1986). The reason for this is that arbitrators derive their authority to resolve disputes “only because the parties have agreed in advance to submit such grievances to arbitration.” *Id.* Thus, courts review the enforceability of nursing facility arbitration agreements through the applicable state contract law. *Id.* As set forth fully below, this Court should find that under Massachusetts law and consistent with the FAA, wrongful death claims like Schrader’s are independent and not subject to arbitration.

A. A Beneficiary’s Wrongful Death Claim in Massachusetts Is Independent and Not Subject to an Arbitration Agreement Between the Decedent and the Nursing Facility.

Whether an arbitration agreement between a deceased nursing facility resident and the nursing facility can bind the decedent’s heirs is a state-specific inquiry. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1424 (2017).

Fundamentally, the inquiry is one concerning ownership of the claim. *See* Brief for Appellants at 14 (collecting cases). There are several aspects of a Massachusetts wrongful death claim that indicate it is independent, and thus not subject to arbitration. *See* Brief of Appellant at 15-18; Reply Brief of Appellant at 10-20. In particular, the Massachusetts wrongful death statute itself, consistent with its common law origins, is not limited to only those claims that the decedent could have recovered for had she lived. *See* G.L. c. 229, § 2 (listing five distinct bases for liability, only two of which require that the deceased could have recovered for personal injuries had his death not resulted). Although wrongful death cases are brought by a representative of the estate, such claims are “in a very real sense ... the [beneficiaries’] cause of action.” *Gaudette v. Webb*, 362 Mass. 60, 72 (1972). In addition, the action does not accrue until the time of death, again counseling that the claim is distinct, belonging solely to the decedent’s beneficiaries. *Sisson v. Lhowe*, 460 Mass. 705, 708 (2011). Finally, the damages available differ from those available to the decedent or her estate, and any damages recovered inure to the statutory beneficiaries through a trust. *Miga v. Holyoke*, 398 Mass. 343, 352 n.10 (1986); *Sullivan v. Goulette*, 344 Mass. 307, 311 (1962).

Indeed, Massachusetts courts consistently hold that a wrongful death claim is a separate and distinct cause of action from claims that are brought by and on behalf of the decedent’s estate. *See, e.g., Pobiegló v. Monsanto Co.*, 402 Mass.

112, 118 (1988) (holding that claims for wrongful death and claims for conscious pain and suffering are “separate causes of action”); *Klairmont v. Gainsboro Rest., Inc.*, 465 Mass. 165, 178 (2013) (“The [consumer protection] claim alleged by the plaintiffs on behalf of the estate is therefore a distinct cause of action separate and apart from the wrongful death cause of action alleging common-law claims.”); *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380, 381 n.4 (1999) (permitting parallel claims under wrongful death act and Massachusetts consumer protection law).

B. Courts In Jurisdictions With Similar Wrongful Death Statutes to Massachusetts Hold Such Claims Are Independent, Not Derivative.

While there is not uniformity among courts throughout the country on this question, Massachusetts’ wrongful death statute is more in line with the jurisdictions that hold these claims are independent. As Plaintiff-Appellees acknowledge (Brief of Plaintiff-Appellees at 40), there are several jurisdictions where courts have held that beneficiaries cannot be compelled to arbitrate their wrongful death claims under agreements signed by or on behalf of a decedent, including: Arizona, Illinois, Kentucky, Louisiana, Maryland, Missouri, Montana, New York, Ohio, Oklahoma, Pennsylvania, Utah, and Washington. Many of these courts addressed this question in the precise circumstances presented here: an arbitration provision was signed by or on behalf of a resident in a nursing facility at

the time of admission, and a subsequent wrongful death action against the facility was brought by the heirs of the deceased resident. Because the wrongful death statutes in these states are similar to Massachusetts, the analysis of those courts is instructive.

For example, in *Ping v. Beverly Enters.*, the Kentucky Supreme Court addressed this issue in a wrongful death case brought against a nursing facility by the administrator of the deceased resident's estate. 376 S.W.3d 581, 597 (Ky. 2012). The Kentucky wrongful death statute, like the Massachusetts statute, creates liability "[w]henver the death of a person results from an injury inflicted by the negligence or wrongful act of another..." KY. REV. STAT. § 411.130; *see also* G. L. c. 229, § 2 ("A person who (1) by his negligence causes the death of a person... shall be liable in damages..."). The Kentucky Supreme Court determined that the decedent "could have agreed to arbitrate *her* claims against [the facility]... and the Estate bringing those claims in her stead would likewise have been bound by her agreement[,]” but “[b]ecause under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree... that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.” *Ping*, 376 S.W.3d at 599. That court went on to note that “[e]ven were her mother’s agreement valid, Ms. Ping’s having executed it as her

mother's representative would not preclude Ms. Ping, as the representative of the wrongful death beneficiaries, from litigating their entirely separate claim." *Id.* at 599. The result should be the same in this case.

Similarly, in *Peters v. Columbus Steel Castings Co.*, the Supreme Court of Ohio held that a wrongful death action is independent of the decedent's claims and a decedent cannot bind his or her beneficiaries to arbitration, even though – like in Massachusetts – the same nominal party prosecutes both actions. 115 Ohio St. 3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, ¶ 19. The Ohio wrongful death statute is more restrictive than Massachusetts's, limiting claims to those “[w]hen the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action to recover damages if death had not ensued....” OHIO REV. CODE § 2125.01. Nevertheless, the court analyzed what it deemed “the separate nature of survival claims and wrongful death claims[.]” *Peters*, 115 Ohio St. 3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, at ¶ 9. The court compared survival and wrongful death actions in Ohio and noted, like in Massachusetts, “a wrongful-death claim belongs to the decedent's beneficiaries” and is for their “*exclusive benefit.*” *Id.* (citing OHIO REV. CODE § 2125.02(A)(2)) (emphasis in original). The court held that the decedent “could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims[.]” *Id.* at ¶ 19.

Courts in several other states likewise hold that a decedent's agreement to arbitrate cannot bind her beneficiaries. *See, e.g., Estate of DeCamocho v. La Solana Care & Rehab., Inc.*, 234 Ariz. 18, 316 P.3d 607, 608 (Ct. App. Ariz. 2014) (concerning arbitration provision contained in a nursing facility admission agreement that was signed on behalf of a resident, and holding wrongful death claims are independent and not subject to an arbitration because a wrongful death claim "is not derived from nor is it a continuation of the claims which formerly existed in a decedent."); *Bybee v. Abdulla*, 2008 UT 35, 189 P.3d 40, 46 (Utah 2008) (holding an arbitration agreement between a deceased patient and his physician could not be used to compel arbitration of the decedent's wife's wrongful death claim, noting that "a wrongful death cause of action, while derivative in the sense that it will not lie without a viable underlying personal injury claim, is a separate claim that comes into existence upon the death of the injured person"); *FutureCare Northpoint, LLC v. Peeler*, 229 Md. App. 108, 143 A.3d 191, 194 (Md. Ct. Spec. App. 2016) (holding a decedent's arbitration agreement does not bind the decedent's family members to arbitrate a claim against a nursing facility because "[a]n action under Maryland's wrongful death statute is separate, distinct, and independent from a survival action, even when those actions arise out of a common tortious act."); *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660, 663 (Penn. Super. Ct. 2013) (holding the administrator of

the decedent's estate could not be compelled to arbitrate a wrongful death claim, noting that "wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights."); *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 57 (beneficiary could not be compelled to arbitrate a wrongful death claim under an arbitration provision signed by the decedent and a nursing facility because such a claim did not belong to the decedent); *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252, 1258 (Wash. Ct. App. 2010) (holding wrongful death claims are independent claims that fall outside the scope of an agreement to arbitrate between a decedent and a nursing facility, and noting that "the action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased."); *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 529 (Mo. 2009) (holding that the adult children of a nursing home resident, including the adult child who had signed the agreement containing the arbitration provision at issue on behalf of her mother, could not be compelled to arbitrate a wrongful death claim because the wrongful death statute created a "new" cause of action that did not belong to the deceased).

Even when a wrongful death claim is partially derivative, in the sense that it comes from the same set of facts as the survivor claim, or allows for the claim if the decedent could have recovered had she lived, courts have found that arbitration

should not be compelled. For example, in *Boler v. Sec. Health Care, LLC*, the Oklahoma Supreme Court held that “a decedent cannot bind the beneficiaries to arbitrate their wrongful death claim.” 2014 OK 80, 336 P.3d 468, 477 (Okla. 2014) (analyzing arbitration provision in nursing home admission contract that one beneficiary had signed on behalf of the decedent). Similarly, the Oklahoma wrongful death statute creates liability when “at the time of his or her death, the decedent had a right of recovery for the injury in suit.” *Id.* 471-72 (citing OKLA. STAT. tit. 12, § 1053). The court found the wrongful death statute created a “new” cause of action for loss suffered by a deceased’s heirs, (36 P.3d at 471-72), noting that recovery under the statute “inures to the exclusive benefit” of the decedent’s heirs (not the estate) and is intended to compensate them for their losses. *Id.* at 477. The Court also held that “[t]he personal representative and the heirs [of a decedent] are not bound to an agreement that they did not sign.” *Id.* The same is true of Schrader’s wrongful death claim.

C. Jurisdictions That Compel Arbitration Of Wrongful Death Actions Pursuant To Agreements Signed By Or On Behalf Of Decedents Are Distinguishable from Massachusetts.

In contrast to the cases described above, there are several courts that have found wrongful death actions to be derivative of a decedent’s claims, and thus subject to an arbitration agreement between the decedent and the defendant. While Plaintiff-Appellees are correct that these jurisdictions make up the majority (Br. At

39), that is not dispositive. In fact, in most of the jurisdictions holding wrongful death claims are derivative, the legislature has determined that – unlike in Massachusetts – the only available action under the wrongful death statute is one where beneficiaries stand in the shoes of the decedent, and thus wrongful death claims are wholly derivative in the sense that they can *only* be brought if the decedent would have been entitled to maintain an action for the underlying injury prior to death. *See, e.g., In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009) (“it is well established that statutory wrongful death beneficiaries’ claims place them in the exact ‘legal shoes’ of the decedent....”); *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 288 (M.D.N.C. 2005) (under North Carolina’s wrongful death statute, such actions are legally derivative of a decedent’s own ability to recovery, because they “exist if and only if the decedent could have maintained an action for negligence or some other misconduct if she had survived.”); *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (compelling arbitration where the wrongful death statute was limited to situations in which the decedent could have recovered damages had death not ensued, and “the estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases”).

Plaintiff-Appellees argue that this analysis cannot be applied to the following four states: New Hampshire, Georgia, Hawaii, and Idaho. Br. for Plaintiff-Appellees, at 41-43. To the extent Plaintiff-Appellees are correct, the distinction they advance matters little, and cases they cite provide little, if any, support for finding in Plaintiff-Appellees' favor.

Plaintiff-Appellee's reliance on the dicta in *Cheever v. Southern N.H. Medical Ctr.* regarding the derivative nature of wrongful death claims is speculative at best. In that case, the New Hampshire Supreme Court dealt with a question concerning the applicable statute of limitations for a wrongful death action. 141 N.H. 589 (N.H. 1997). The court's holding relied on a plain-language interpretation of the relevant New Hampshire statute, and found any distinctions between the wrongful death and survival actions to be "immaterial" in that context. *Id.* at 591-2.

The nature of a wrongful death action in Hawaii is not as clear as Plaintiff-Appellees make it seem. Indeed, there is not a case in Hawaii squarely addressing the question at issue here. *Bertelmann*, the case on which they rely, barred a wrongful death action because it was derivative from *the decedent's injuries*, not that the claim itself was derivative in nature. The opinion does not deal at all with who owns the claim, or whether such a claim would be subject to arbitration. Indeed, a more recent district court applying *Bertelmann* and its progeny held the

opposite: “the wrongful death action [in Hawaii] *is a separate and independent action* in the sense that it seeks different, if derivative damages, accrues at the time of death rather than the time of injury, and is subject to a different statute of limitations.” *Iida v. Allied Signal (In re Haw. Fed. Asbestos Cases)*, 854 F. Supp. 702, 712 (D. Haw. 1994) (emphasis added).

The Idaho opinion Plaintiff-Appellees rely on does not establish that wrongful death claims in Idaho are derivative. In *Woodburn v. Manco Prods.*, the Idaho Supreme Court applied comparative negligence doctrine, as required by statute and precedent. 137 Idaho 502, 507 (Idaho 2002). For the reasons described in Defendant-Appellee’s Brief at 16-17, that analysis is not relevant to the inquiry here. Moreover, the *Woodburn* Court acknowledged that a wrongful death claim is only derivative “in the sense that [the claim] would not have arisen but for the death of the decedent.” *Woodburn* at 506. The more relevant Idaho decision is *Russell v. Cox*, which holds that “[t]he [wrongful death] cause of action is not anything that ever belonged to the decedent or to his estate. It never accrued to the decedent. . . . The statute confers this right of action on the heirs, and it gives it directly to them...” 65 Idaho 534, 538-41 (Idaho 1994).

Finally, Defendants highlight *United Health Services of Georgia, Inc. v. Norton*, 300 Ga. 736 (2017). While the Georgia statute may not say that a wrongful beneficiary may only bring a claim where the decedent could have brought one

during life, this is a distinction with little difference. The case relies on precedent specific to Georgia dating back to the 1900s. The Court explained that the wrongful death statute in Georgia “essentially places a beneficiary in the same shoes as the decedent, thus, a beneficiary is bound by the decedent’s promise to arbitrate.” *Id.* at 739, n.4 (citing *Thi of Ga. at Shamrock, LLC v. Fields*, 2013 U.S. Dist. LEXIS 168598, 2013 WL 6097569 (III) (A) (S.D. Ga. 2013)). No such precedent exists in Massachusetts that would require a similar interpretation of the wrongful death statute.

In addition, the California case identified by Plaintiff-Appellees as treating wrongful death claims as derivative and requiring arbitration, is similarly distinguishable. *See Ruiz v. Podolsky*, 50 Cal. 4th 838, 237 P.3d 584, 591 (Cal. 2010) (compelling arbitration of wrongful death claim against a nursing facility despite the “independent” nature of wrongful death claim, because the California Medical Injury Reform Act of 1975 permits patients who sign arbitration agreements to bind their heirs in wrongful death actions.). These state cases and statutes are distinguishable from the wrongful death action available in Massachusetts.

CONCLUSION

For these reasons, Amici respectfully request that the Court find that the wrongful death claim of Emma Schrader’s statutory heirs is independent of Emma

Schrader's own cause of action, and that Jacklyn Schrader's wrongful death claim is not subject to arbitration.

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CERTIFICATE OF SERVICE

I, Steven Schwartz, hereby certify that the foregoing Brief of AARP, AARP Foundation, the National Consumer Voice, Justice In Aging, the Center for Public Representation, and the National Academy of Elder Law Attorneys as Amici Curiae Supporting Defendant-Appellant complies with the rules of court that pertain to service of briefs pursuant to Mass. R. A. P. 13(e) and was served on all parties of record through electronic filing to:

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CERTIFICATE OF COMPLIANCE

I, Steven Schwartz, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. A. P. 16(a) (contents of briefs); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 17 (amicus briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

I also certify that the foregoing brief complies with Mass. R.A.P. 20(a)(2)(C). The brief contains 5,493 non-excluded words in Times New Roman, size 14 font, and was produced using Microsoft Word 2016.

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