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COVID-19 AND NURSING HOMES:

What Went Wrong and Next Steps



Majority Staff Report of the Senate Finance Committee

MAJORITY STAFF REPORT



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INTRODUCTION

This report discusses the findings of the majority staff of the United States Senate Committee on Finance, following a review of nursing home performance during the first eight months of the COVID-19 pandemic. Nearly 1.4 million individuals reside in approximately 15,600 Medicaid-enrolled nursing facilities and Medicare-enrolled skilled nursing facilities nationwide.¹ Some of these facilities, which are the subject of this report, have provided exemplary care to their residents, while others became overwhelmed, during the COVID-19 outbreak.² Data indicates that over two out of five deaths due to COVID-19 in the United States are linked to nursing homes and other long-term care facilities,³ leading critics to dub these facilities “death traps” or “death pits.”⁴

¹ CTRS. FOR DISEASE CONTROL AND PREVENTION [hereinafter “CDC”], “Long-term Care Providers and Services Users in the United States 2015-2016,” NAT’L CTR. FOR HEALTH STATISTICS, Series 3, No. 43 (Feb. 2019), https://www.cdc.gov/nchs/data/series/sr_03/sr03_43-508.pdf; see also CDC, Webpage, “Nursing Home Care” (last visited Sept. 21, 2020), <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>.

² Suzy Kim and Laura Strickler, *Nursing Homes Overwhelmed by Coronavirus: ‘It Is Impossible For Us to Stop the Spread; Coronavirus Cases are Increasing So Rapidly that One New York Nursing Home CEO is Advising Families to Take Their Loved Ones Home if Possible’*, NBC NEWS (Apr. 1, 2020), <https://www.nbcnews.com/news/us-news/nursing-homes-overwhelmed-coronavirus-it-impossible-us-stop-spread-n1174171>.

³ *More Than 40% of U.S. Coronavirus Deaths Are Linked to Nursing Homes*, N.Y. TIMES (updated Aug. 13, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-nursing-homes.html>. Andy Markowitz, *AARP Answers: Nursing Homes and the Coronavirus*, AMERICAN ASS’N OF RETIRED PERSONS [hereinafter “AARP”] (updated Sept. 2, 2020), <https://www.aarp.org/caregiving/health/info-2020/nursing-homes-coronavirus-faqs.html> (noting that 2 in 5 deaths due to COVID-19 across the nation have occurred in nursing homes and other long-term care facilities).

⁴ Farah Stockman, Matt Richtel, et al., *‘They’re Death Pits’: Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, N.Y. TIMES (Apr. 17, 2020) (quoting Betsy McCaughey, former Lieutenant Governor of New York and founder of the Committee to Reduce Infection Deaths, an education campaign aimed at stopping hospital-acquired infections.), <https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html>. See also Danny Feingold, *Death Trap: When COVID-19 Hit L.A. Nursing Homes, Where Was the County’s Department of Public Health?*, CAPITOL & MAIN (June 15, 2020), <https://capitalandmain.com/covid19-hit-los-angeles-nursing-homes-where-was-department-of-public-health-0615>.

EXECUTIVE SUMMARY

As of this report, over 6.5 million people have been stricken by the coronavirus, known as COVID-19, across the United States.⁵ Over 250,000 new COVID-19 cases were confirmed in this country in the last week alone.⁶ The elderly are particularly susceptible to its adverse effects,⁷ and residents of nursing homes seem to be even more so.⁸ Because there are over 216,000 confirmed coronavirus cases (plus roughly 130,000 suspected cases) and over 53,000 deaths at nursing homes across the United States,⁹ questions have arisen about the plight of their residents and frontline workers during this pandemic. This report does not seek to answer all such questions, but rather focuses on two of the most pressing, for congressional oversight and policymaking purposes:

- First, what steps, if any, might have prevented these fatalities due to COVID-19 in nursing homes?
- Second, what future steps could be taken to stem the tide of deaths in nursing homes during this, or any future, pandemic?

A few members of this chamber already have advanced their own explanation for the spread of COVID-19 in nursing homes.¹⁰ Their explanation relied, in part, on data that was

⁵ CDC, “Cases in the U.S.” (last visited Sept. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. See also *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (updated Sept. 21, 2020) <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁶ CDC, Webpage, “Cases in the U.S.” (last visited Sept. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁷ CDC, Webpage, “Older Adults” (last visited Sept. 21, 2020) (providing data that “80% of reported COVID-19 deaths have been in adults over the age of 65.”), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

⁸ As of mid-April, deaths in nursing homes accounted for more than half of all COVID-19 fatalities in 14 states, by one estimate. See Priya Chidambaram, *State Reports of Long-Term Care Facility Cases and Deaths Related to COVID-19*, KAISER FAMILY FOUNDATION [hereinafter “KFF”], (Apr. 23, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-reporting-of-cases-anddeaths-due-to-covid-19-in-long-term-care-facilities/>.

⁹ CTMS. FOR MEDICARE AND MEDICAID SERVICES [“hereinafter CMS”], Webpage, “Resident Cases and Deaths” (last visited Sept. 21, 2020), <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>. *More Than 40% of U.S. Coronavirus Deaths Are Linked to Nursing Homes*, *supra* note 3. See also Dylan Scott, *Why the Coronavirus Has Taken So Many Lives in US Nursing Homes*, VOX (Jun. 3, 2020), <https://www.vox.com/2020/6/3/21279431/nursing-homes-coronavirus-covid-19-deaths-cuomo-cdc>.

¹⁰ See, e.g., MINORITY STAFF OF S. SPECIAL COMM. ON AGING, 116th CONG., *Report on COVID-19 in Nursing Homes; How the Trump Administration Failed Residents and Workers* [hereinafter “SCA Minority COVID-19 Nursing Home Report”] (July, 2020), <https://www.aging.senate.gov/imo/media/doc/COVID-19%20in%20Nursing%20Homes%20Final%20Report.pdf>.

merely preliminary and released without the approval of the Federal Emergency Management Administration.¹¹ Partisan finger pointing, rather than meaningful analysis,¹² cannot serve as a useful guide for policymakers in crafting the necessary bipartisan reforms, in response to the unprecedented challenges facing this entire sector and its employees working on the frontlines during this pandemic.

Any suggestion that coronavirus-related deaths in nursing facilities are attributable solely, or even primarily, to acts or omissions by the current administration falls well short of addressing the multi-faceted problems in this sector. Such a one-dimensional approach necessarily overlooks several factors that fueled the outbreak of COVID-19 in nursing homes across the United States, and around the world. Minimizing, or devoting scant attention to such factors, makes it enormously difficult for members of Congress to come together in support of long-overdue reforms and bipartisan solutions to the complex problems facing nursing homes today. Consider, for example, the following factors, discussed in greater detail in this report:

- Decades of research support the notion that infection control measures are critical to curbing the transmission of pathogens, like COVID-19, in nursing homes.
- The vast majority of nursing homes in the United States are privately run, with their owners and operators bearing the primary responsibility for adopting, and ensuring adherence to, infection control and prevention protocols in their facilities.¹³
- A steady stream of annual reports by watchdog agencies point to the existence of widespread deficiencies in infection control and prevention at many of our nation’s private nursing homes, for many years preceding the COVID-19 outbreak.¹⁴

¹¹ Appendix A of this report, which includes Federal Emergency Management Administration data, provides more up-to-date information on the supplies of personal protective equipment furnished to nursing homes across the United States by the Trump Administration.

¹² *Id.* at 1 (maintaining that the “Trump Administration failed to execute a coordinated strategy . . . [and as a result, people] who live in nursing homes and the workers who care for them are among those most affected by COVID-19.”).

¹³ Charlene Harrington, Helen Carrillo, et al., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016*, KFF, (Apr. 3, 2018), (reporting that “[o]ver the 2009 to 2016 period, share of nursing facilities that were for-profit increased slightly, from 67% in 2009 to 69% in 2016, while the share that were non-profit declined slightly from 26% in 2009 to 24% in 2016 (the remainder, about 7% over time, were government-owned). Ownership patterns vary widely across states, with states in the South and West having higher shares of facilities that are for-profit.”), <http://files.kff.org/attachment/REPORT-Nursing-Facilities-Staffing-Residents-and-Facility-Deficiencies-2009-2016>.

¹⁴ GOV’T ACCOUNTABILITY OFFICE [hereinafter “GAO”], GAO-20-576R, *Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic* (May 20, 2020), <https://www.gao.gov/assets/710/707069.pdf>.

- Government licensing and certification of nursing homes in the United States is solely a State responsibility, and State health officials are also responsible for ensuring that nursing homes within their respective jurisdictions provide quality care. Research underscores the link between quality of care and staffing, but in multiple States, staffing shortages in nursing home staffing and supplies persisted for years prior to this year’s COVID-19 pandemic.¹⁵ Such shortages can fuel the spread of infectious disease in nursing homes.
- States also are responsible for conducting periodic health and safety inspections to ensure that violations of Federal guidelines for participation in the Medicare and Medicaid programs (which account for about half of total U.S. nursing home spending) are identified and corrected at State-certified facilities.
- Nursing home staff who work in multiple facilities unwittingly played a key role in COVID-19 transmission in nursing homes. (For example, staff at the Kirkland, Washington facility that was the site of our nation’s very first nursing home outbreak spread the virus to at least three other nursing homes, according to the Centers for Disease Control and Prevention (“CDC”).)¹⁶
- As explained below, there also were some nursing homes across the United States that did not consistently adhere to Federal guidance for minimizing coronavirus transmission in their facilities, e.g., through the isolation of the infected from the uninfected.
- Nursing homes around the globe have struggled with many of the same issues as the United States during the pandemic, with those Europe and the United Kingdom as hard

¹⁵ See, e.g., Rebecca Moss, *Coronavirus exploited failure of Pa. health officials to improve long-standing problems with nursing home oversight*, SPOTLIGHT PA (Jun. 13, 2020), <https://www.spotlightpa.org/news/2020/06/pennsylvania-coronavirus-nursing-homes-staffing-audits-problems-deaths/> (“Pennsylvania’s already low minimum staffing requirements, long criticized as “totally unsafe,” were exacerbated by the pandemic”), <https://www.post-gazette.com/news/health/2020/06/15/The-coronavirus-exploited-failure-of-Pa-healthofficials-to-improve-long-standing-problems-with-nursing-home-oversight/stories/202006150025>; Charlene Harrington, Leslie Ross, et al., *Nurse Staffing and Coronavirus Infections in California Nursing Homes*, POLICY, POLITICS AND NURSING PRACTICE 2 (July 2020) (“inadequate staffing levels in many nursing homes” was a contributing factor in the COVID-19 outbreak), https://theconsumervoive.org/uploads/files/issues/Harrington_Ross_et_al_Nurse_Staffing_and_Coronavirus_Infections_in_NHs_July_2020.pdf. See also CMS, Webpage, “COVID-19 Nursing Home Data,” (last visited Sept. 21, 2020), <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>.

¹⁶ Betsy McKay, *Staff at Kirkland Facility With Coronavirus Outbreak Spread It to Other Facilities, Study Finds*, WALL ST. J. (Mar. 18, 2020), <https://www.wsj.com/articles/staff-at-kirkland-facility-with-coronavirus-outbreak-spread-it-to-other-facilities-study-finds-11584551021>.

hit by the coronavirus as nursing homes in the United States.¹⁷ (In at least one other North American country, Canada, the nursing home fatality rate was nearly double that of the United States.)¹⁸

- Governors in a handful of States pressured nursing facilities to accept COVID-19 patients, in the initial phase of the outbreak, at a time when personal protective equipment (or “PPE”) still was in short supply in the United States. Some governors did so even when the Federal government made temporary hospitals available in their jurisdictions. Attorneys and Inspectors General in some of these States, such as California and New York, as well as the U.S. Department of Justice have initiated reviews of these public officials’ actions.
- In response to reports that the nursing home sector in the United States has sustained total losses of at least \$2 billion per month, on average, over the last eight months, this sector has received significant relief assistance from Congress and the Trump Administration. The sector to date has received approximately \$21 billion in emergency assistance under relief packages signed by President Trump, according to CMS--including direct relief assistance and fully forgivable loans through programs established by the Small Business

¹⁷ Adelina Comas-Herrera, Joseba Zalakaín, et al., *Mortality Associated with COVID-19 Outbreaks in Care Homes: Early International Evidence*, INT’L LONG-TERM CARE POLICY NETWORK (May 3, 2020), <https://ltccovid.org/wp-content/uploads/2020/05/Mortality-associated-with-COVID-3-May-final-6.pdf>. See also Boston Univ. School of Medicine, Webpage, “For Many States and Countries, Long Term Care Facilities Are Where Most COVID-19 Deaths Occur” (“In early May, Canada indicated that 82 percent of its deaths are in LTCFs. The World Health Organization estimates that half of all COVID-19 deaths in Europe and the Baltics happen in nursing and care homes.”), <https://www.bumc.bu.edu/busm/2020/06/05/for-many-states-and-countries-long-term-care-facilities-are-where-most-covid-19-deaths-occur/>.

¹⁸ Amanda Coletta, *Canada’s Nursing Home Crisis: 81% of Deaths are Long-Term Care Facilities*, THE WASHINGTON POST (May 18, 2020), https://www.washingtonpost.com/world/the-americas/coronavirus-canada-long-term-care-nursing-homes/2020/05/18/01494ad4-947f-11ea-87a3-22d324235636_story.html. *The Washington Post* also suggested that the virus devastated Canadian nursing homes in part because staff worked at multiple nursing homes, and, in some areas, e.g., Ontario, “public health officials, faced with limited testing kits, initially advised against testing all long-term care residents. They also said health aides needed personal protective equipment only if their facilities had outbreaks.” *Id.*

Administration and the Federal Reserve.¹⁹ Federal health officials also made available, and continue to provide, technical assistance, guidance, and training to nursing homes across the United States.

This report incorporates a three-part analysis. First, it identifies the issues and challenges confronting all nursing facilities during the pandemic. Second, it focuses on the reasons why this novel coronavirus had an especially deadly impact on some facilities, but not on others. Third, it seeks to identify the best practices among facilities in which the virus apparently had no, or only a limited, impact. Such an analysis could help elucidate what works best, and what does not work, in mitigating, or at least slowing the extent of COVID-19 transmission in these vulnerable facilities in the coming weeks and months. This report concludes by making recommendations for policymakers on next steps to promote the quality of life and safety of nursing home residents and frontline workers in these facilities, across the United States.

I. WHAT WENT WRONG: FACTORS FUELING COVID-19 FATALITIES IN MANY NURSING HOMES

One factor in rising coronavirus-related fatality rates in our nation’s nursing homes is the challenges with which many facilities struggled for years, well before the outbreak of COVID-19.²⁰ Such challenges include the difficulties in recruiting and retaining staff, the unique

¹⁹ CMS, Press Release: “Independent Nursing Home COVID-19 Commission Findings Validate Unprecedented Federal Response” (Sep. 16, 2020) (describing the distribution, by the Trump administration, of “over \$21 billion to America’s nursing homes – more than \$1.5 million each on average” and the shipment of a 14-day supply of PPE to more than 15,000 nursing homes in May), available at <https://www.cms.gov/newsroom/press-releases/independent-nursing-home-covid-19-commission-findings-validate-unprecedented-federal-response>. See also Danielle Brown, *HHS formally releases \$2.5 billion in relief for nursing homes*, MCKNIGHT’S LONG TERM HEALTH NEWS (Aug. 28, 2020), <https://www.mcknights.com/news/hhs-formally-releases-2-5-billion-in-relief-for-nursing-homes-mentoring/>; Maggie Flynn, *HHS to Send Additional \$5B to Nursing Homes, Increase Staff Testing Requirements in Hotspots*, SKILLED NURSING NEWS (Jul. 22, 2020), <https://skillednursingnews.com/2020/07/hhs-to-send-additional-5-billion-from-provider-relief-fund-to-all-nursing-homes-in-u-s/>; Alex Spanko, *PPP and Skilled Nursing By the Numbers: \$165M in Small Loans, 35K Jobs Retained*, SKILLED NURSING NEWS (July 23, 2020), <https://skillednursingnews.com/2020/07/ppp-and-skilled-nursing-by-the-numbers-165m-in-small-loans-35k-jobs-retained/>; Tim Regan, *New \$600B Covid-19 Loan Program Could Aid Senior Living After PPP Shuts Down*, SENIOR HOUSING NEWS (Apr. 17, 2020), <https://seniorhousingnews.com/2020/04/17/new-600b-covid-19-loan-program-could-aid-senior-living-after-ppp-shuts-down/>.

²⁰ See, e.g., GAO, HEHS-99-157, *Nursing Homes: Proposal to Enhance Oversight of Poorly Performing Nursing Homes Has Merit* (June 30, 1999), <https://www.gao.gov/products/HEHS-99-157>; GAO, GAO-06-117, *Nursing Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety* (Dec. 28, 2005), <https://www.gao.gov/products/GAO-06-117>; GAO, GAO-03-1016T, *Nursing Homes: Prevalence of Serious Quality Problems Remains Unacceptably High, Despite Some Decline* (July 17, 2003), <https://www.gao.gov/products/GAO-03-1016T>.

susceptibility of seniors to this particular virus, and the fact that congregate living institutions with many residents and workers are ideal settings for the spread of an infectious disease.

Although the existence of these commonalities helps explain why nursing homes were so hard hit by this virus, it does not fully explain the wide variations in nursing home fatality rates. Disparities in nursing home case or fatality rates exist within communities across the United States; and such disparities exist among countries too. (To illustrate: as of June 2020, the proportion of long-term care deaths during this pandemic reportedly ranged from less than 10% in Slovenia and Hungary, to 31% in the United States, to 66% in Spain, and 81% in Canada.²¹ Consider, too, that, in Asia, nursing homes in China struggled, but those in nearby Mongolia have not had a single COVID-19 fatality.)²² In sum, these common challenges facing all nursing homes do not completely explain why some, especially in the United States have been so overwhelmed by the coronavirus,²³ while others—even those in cities or geographic “hot spots”—have so far escaped its worst effects.²⁴

To explain such wide variations between facilities and among jurisdictions, it is necessary to delve deeper. One issue to consider, for example, is the presence (or absence) of COVID-19 in the surrounding community. A second issue, because the spread of this virus is so difficult to contain once it enters a facility, is the initial response of nursing home owners and operators in the earliest phases of the pandemic. A third issue, related to the second, is a facility’s history of deficiencies (because some experts say that persistent infection control and prevention deficiencies correlate with higher infection transmission rates). Additional issues to consider include the facility’s size, demographic makeup, efforts made to ensure adequate

²¹ Cassandra Szklarski, *Canada's Proportion of COVID-19 Deaths in Long-term Care Double the Average of Other Countries, Study Shows*, THE CANADIAN (Jun. 25, 2020), <https://www.cbc.ca/news/health/coronavirus-canada-long-term-care-deaths-study-1.5626751>.

²² James Gallagher, *Coronavirus: Is the World Winning the Pandemic Fight?*, BBC NEWS (Aug. 10, 2020) (finding that as of August 10, 2020, Mongolia only had 293 cases of COVID-19 and no deaths resulting from the virus, pointing out that “Mongolia has done a good job with very limited resources.”), <https://www.bbc.com/news/health-53694982>; See also Boston Univ. School of Medicine, *supra* note 17 (“Hong Kong reports no LTCF COVID-19 deaths and South Korea and Singapore each report fewer than 20 such deaths. New Zealand, because it closed its borders early and with its strict quarantining policy, also reports fewer than 20 LTCF COVID-19 deaths.”).

²³ Scott McClallen, *Analysis: Minnesota has highest percentage of COVID-19 deaths in long-term care facilities in the nation*, THE CENTER SQUARE (May 14, 2020) (“As of mid-May, Minnesota reportedly had the highest percentage of COVID-19 deaths in long-term care facilities nationwide.”), https://www.thecentersquare.com/minnesota/analysis-minnesota-has-highest-percent-of-covid-19-deaths-in-long-term-care-facilities-in/article_1acd0d9e-9608-11ea-8cd2-1f8278e4af2b.html.

²⁴ See, e.g., Amna Nawaz, *This Maryland Nursing Home Has Had No Coronavirus Cases. How Did They Do It?*, PBS NEWS (July 9, 2020), <https://www.pbs.org/newshour/show/this-maryland-nursing-home-has-had-no-coronavirus-cases-how-did-they-do-it>; but see Eliot C. Williams, *Maryland Issues \$70,000 Fine to Nursing Home Over Failure to Prevent Coronavirus Spread*, DCIST (June 26, 2020), <https://dcist.com/story/20/06/26/pleasant-view-nursing-home-maryland-covid19-outbreak-fine/>.

staffing during COVID-19, effectiveness of State officials in preparing for and responding to this national public health emergency, and the extent to which testing kits and personal protective equipment were used by facility employees to help contain and manage the spread of the virus. Examining these additional factors can shed much needed light on differences and disparities in cases, hospitalizations, fatalities, and transmission rates among nursing homes across the United States.

A. CHALLENGES COMMON TO VIRTUALLY ALL NURSING HOMES

There are approximately 1.7 million nursing home beds across the United States.²⁵ By one estimate, the nationwide average is 109 beds per nursing home.²⁶ But nursing homes do vary widely in size and occupancy rates. For example, States in the East reportedly have larger facilities with higher occupancy rates.²⁷ About 69% of nursing homes are for-profit facilities,²⁸ while nearly a quarter are non-profit (and a majority are chain-operated); a much smaller fraction (or just 7%) are government owned.²⁹ (States in the South and West reportedly have a higher percentage of for-profit facilities.)³⁰

In addition, although all U.S. nursing homes must be State licensed and certified before admitting residents, many also seek additional certification, under Federal guidelines, to receive payments through the Medicare and Medicaid programs.³¹ (A total of 15,436 long-term care facilities, with 1.6 million beds, were enrolled in either or both of these Federal programs, according to the Congressional Research Service.³² Most, or 94%, are dually certified by State

²⁵ See CDC, Webpage, “Nursing Home Care”, NAT’L CTR. FOR HEALTH STATISTICS (last visited Sept. 21, 2020), <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>.

²⁶ Charlene Harrington, et al., *supra* note 13, at 1.

²⁷ *Id.* at 7.

²⁸ See CDC, Webpage: “Nursing Home Care,” *supra* note 25.

²⁹ *Id.*; see also Charlene Harrington, et al., *supra* note 13, at 9; see also CDC, Webpage, “U.S. Nursing Homes Profiled in A New Report” (last visited Sep. 21, 2020), available at <https://www.cdc.gov/nchs/pressroom/00facts/nurshome.htm>.

³⁰ Charlene Harrington, et al., *supra* note 13, at 9.

³¹ Phoenix Voorhies and Kirsten J. Colello, “Overview of Federally Certified Long-Term Care Facilities,” CONG. RESEARCH SERV., IF11545 (May 11, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11545>.

³² *Id.* at 1.

agencies under both Medicare and Medicaid, while about 4% are certified as Medicare only, and about 2% are certified as Medicaid only.)³³

Despite the above differences, most, or virtually all, nursing homes face some of the same challenges in operating. These shared challenges can arise irrespective of a facility’s geographic location, size, or organizational structure. As discussed in a study published by the University of Oxford in a 17 year-old article, for example:

“[T]hese facilities provide an ideal environment for acquisition and spread of infection: susceptible residents who share sources of air, food, water, and health care in a crowded institutional setting. Moreover, visitors, staff, and residents constantly come and go, bringing in pathogens from both the hospital and the community. Outbreaks of respiratory and gastrointestinal infection predominate in this setting, but outbreaks of skin and soft-tissue infection and infections caused by antimicrobial-resistant bacteria also occur with some frequency.”³⁴

As noted by another researcher: “Morens and Rash reported an outbreak of influenza A infection in a 37-bed unit of a 5-ward nursing home in Honolulu, Hawaii, that affected 28% of exposed residents, even though 92% of residents had received influenza vaccine prior to the outbreak. Moreover, 6 (55%) of 11 infected residents died of their illness. Similarly, Auerbach and colleagues reported an outbreak of *Streptococcus pyogenes* infection in a North Carolina nursing home that affected 16 (20%) of 80 residents and 3 (7%) of 45 staff. Four (36%) of 11 residents with invasive disease died of their infections.”³⁵

1. The Challenge of Recruiting and Retaining Qualified Staff

The nursing home sector maintains that keeping highly qualified caregivers is one of the top

³³ *Id.*

³⁴ Larry J. Strausbaugh, Shirin R. Sukumar, et al., *Infectious disease outbreaks in nursing homes: an unappreciated hazard for frail elderly persons*, CLIN. INFEC. DIS. (Apr. 1, 2003), <https://pubmed.ncbi.nlm.nih.gov/12652388/>.

³⁵ HUB Staff Report, “COVID-19 Poses Particular Challenges for Nursing Homes,” The HUB, Johns Hopkins Univ. (Apr. 2020), <https://hub.jhu.edu/2020/04/01/alice-bonner-coronavirus-nursing-homes/>.

challenges it faces. This is reinforced by academic research³⁶ and media reports.³⁷ It is also underscored by complaints voiced by some nursing home residents, which include, for example, “slow response to calls,” “staffing issues,” or “a lack of social interaction.”³⁸

In adopting the 1987 Nursing Home Reform Law, Congress required that nursing homes participating in the Medicare and Medicaid programs must retain a registered nurse [RN] for eight consecutive hours each day, employ licensed nurses around the clock, and have “otherwise ‘sufficient’ nursing staff to meet residents’ needs.”³⁹ Federal regulations also require that all Medicare- and Medicaid-funded nursing homes have sufficient nursing staff to maintain their residents’ well-being.⁴⁰

By one account, nursing facilities that meet the staffing requirements in 42 C.F.R. § 483.35 devote about two-thirds of total spending, on average, to staffing.⁴¹ This is confirmed by a

³⁶ Deborah Quilter, *What Some Nursing Homes Do to Retain Quality Staff; Keeping great caregivers is one of the biggest challenges the facilities face*, NEXT AVENUE (Jun. 11, 2019), <https://www.nextavenue.org/nursing-homes-retain-quality-staff/>. See also Brian E. McGarry, David C. Grabowski, et al., “Special Report: Pandemic exposes systemic staffing problems at U.S. nursing homes,” REUTERS <https://www.reuters.com/article/us-health-coronavirus-nursinghomes-speci/special-report-pandemic-exposes-systemic-staffing-problems-at-u-s-nursing-homes-idUSKBN23H1L9>.

³⁷ See, e.g., Kimberly Marselas, “Staggering’ 75% of nursing homes almost never meet expected RN staffing levels, study finds,” MCKNIGHT’S LONG TERM HEALTH NEWS (Jul. 1, 2019), <https://www.mcknights.com/news/staggering-75-of-nursing-homes-almost-never-meet-expected-rn-staffing-levels-study-finds/>. See also CONNECTICUT HEALTH I-TEAM, *Staffing Levels, Culture Challenge Quality Of Nursing Home Care* (Dec. 11, 2018), <http://c-hit.org/2018/12/11/staffing-levels-culture-challenge-quality-of-nursing-home-care> (“In 2018, the state took the unusual step of issuing a consent order requiring a New Haven nursing home to hire an independent nurse consultant and implement minimum staffing ratios after inspections at the facility uncovered numerous lapses in care and safety violations....It isn’t often that DPH mandates staffing or requires nursing homes to hire consultants, but *the order reflects a broader emerging problem affecting the care provided at many nursing homes: insufficient staffing levels and caregivers who lack training.*” [Emphasis added.]

³⁸ See, e.g., CAITLIN MORGAN INSURANCE SERVICES, Webpage, “The Top Complaints Residents Have About Nursing Homes” (last visited Sept. 21, 2020), available at <https://www.caitlin-morgan.com/the-top-complaints-residents-have-about-nursing-homes/>. Under the Older Americans Act [hereinafter “OAA”], every State must have a fulltime long-term care ombudsman program to field complaints (and advocate for improvements) in the long-term care system. See Sections 307(a)(9)(A) and 712 and of P.L. 89-73 (as amended through P.L. 116–131, enacted March 25, 2020), <https://acl.gov/sites/default/files/about-acl/2020-04/Older%20Americans%20Act%20Of%201965%20as%20amended%20by%20Public%20Law%20116-131%20on%203-25-2020.pdf>.

³⁹ Portia Wofford, *Nurses Say Staffing Ratios in Long Term Care Facilities Are Unsafe*, NURSE.ORG (July 11, 2019), <https://nurse.org/articles/nurse-staffing-unsafe-long-care-facilities/>.

⁴⁰ 42 C.F.R. § 483.35. Charlene Harrington et al., *supra* note 13 at 3 (citing American Nurses’ Association, Coalition of Geriatric Nursing Organizations, and other organizations that have suggested a nursing home should retain a registered nurse around the clock).

⁴¹ Alex Kacez, *Nursing Home Staffing Levels Fall Below CMS Expectations*, MODERN HEALTH CARE (July 1, 2019), <https://www.modernhealthcare.com/providers/nursing-home-staffing-levels-often-fall-below-cms-expectations>.

spokesman for the nursing home industry in Iowa, who recently advised Committee staff that the typical nursing home in Iowa spends roughly \$7 of every \$10 it receives on staffing.⁴²

Still, media reports suggest that “most nursing homes never meet Federal staffing expectations for registered nurse staffing, and RNs are often missing from such facilities on the weekends.”⁴³ The reason may be that nurses and aides employed by nursing homes usually earn comparatively less than nurses and aides employed by hospitals. Nursing home aides—who tackle many of the routine, day-to-day tasks such as feeding, washing, and caring for residents—ordinarily earn about \$14 per hour.⁴⁴ The low pay rate leads some aides to take on additional jobs.⁴⁵

Staffing is a key measure of nursing home quality, by most accounts.⁴⁶ Researchers have uncovered a link between nurse staffing shortfalls and the spread of infection among both nursing home residents⁴⁷ and hospital patients.⁴⁸ Emotional exhaustion, or burnout, among registered nurses provides one “plausible explanation” for the spread of infections in facilities

⁴² Iowa Health Care Association, “Legislative Table Talk” (Zoom Webinar) (Aug. 28, 2020).

⁴³ Kimberly Marselas, *supra* note 37 (“Three-fourths of the nation’s nursing homes never meet federal staffing expectations for registered nurse staffing, and RNs are often missing from such facilities on the weekends, according to a new review of a year’s worth of payroll data.”). See also James M. Berklan, *Nursing home staffing headed for more scrutiny*, MCKNIGHT’S LONG-TERM CARE NEWS (Aug. 7, 2020), <https://www.mcknights.com/daily-editors-notes/nursing-home-staffing-headed-for-more-scrutiny-again/>.

⁴⁴ U.S. BUREAU OF LABOR STATISTICS, *Occupational Outlook Handbook* (last visited Sept. 21, 2020), <https://www.bls.gov/ooh/healthcare/nursing-assistants.htm>. See also “Hourly Wage for Certified Nursing Assistant – Nursing Home Salary in the United States,” SALARY.COM (last visited Sept. 21, 2020) (“noting that the average pay rate for a certified nursing assistant in one of the nation’s nursing homes is \$14 as of August 27th, but the range typically falls between \$13 and \$14 per hour), <https://www.salary.com/research/salary/benchmark/certified-nursing-assistant-nursing-home-hourly-wages>.

⁴⁵ Sophie Quinton, *Staffing nursing homes was hard before the pandemic. Now it’s even tougher*, STATELINE (May 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/05/18/staffing-nursing-homes-was-hard-before-the-pandemic-now-its-even-tougher>. See also GAO, GAO-02-431R, *Nursing Homes: Quality of Care More Related to Staffing Than Spending* (Jun. 13, 2002), <https://www.gao.gov/products/GAO-02-431R>.

⁴⁶ David Hefner, *Understaffed Nursing Homes Affecting Patients*, J. NAT’L MED. ASSOC. (May 2002) (citing a Federal study indicating that patients “in most nursing homes are not receiving proper care due to a shortage of workers”), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2594332/?page=1>; GAO,

⁴⁷ See, e.g., Jeannie P. Cimiotti, Linda H. Aiken et al., *Nurse staffing burnout, and health care-associated infection*, AM. J. INFECT. CONTROL (Aug. 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3509207/>.

⁴⁸ *Columbia Nursing Study Finds Link Between HAIs and Nurse Understaffing*, INFECTION CONTROL TODAY (Aug. 5, 2019) (citing Jingjing Shang, Jack Needleman, et al, “Nurse Staffing and Healthcare Associated Infection, United Level Analysis,”⁴⁹ *Journal of Nursing Home Admin.* 260-265, May 2019)), <https://www.infectioncontroltoday.com/view/study-finds-link-between-hais-and-nurse-understaffing>.

with inadequate staffing, experts suggest.⁴⁹ Conversely, higher nurse staffing levels correlate with better outcomes of care:

“Over the past 25 years, numerous research studies have documented a significant relationship between higher nurse staffing levels, particularly RN staffing, and the better outcomes of care. Though several recommendations for minimum staffing levels have been put forth, there are not federal requirements for specific nurse staffing levels (though some states do have their own minimum staffing requirements).”⁵⁰

As explained in another article, “When nurses and nurse aides are stretched thin they end up cutting corners. They might fail to wash their hands often enough, or try to lift a frail person by themselves—harming themselves or the people in their care.”⁵¹

For-profit nursing homes may have less favorable staff-to-patient ratios. One study of nursing home data by the New York University School of Business found a sharp rise in the number of nursing homes owned by private equity firms in recent years.⁵² Such firms owned fewer than 600 nursing homes in 2004, but they owned more than 1,500 in 2019.⁵³

According to the study’s findings, a sharp rise in private equity-ownership of nursing homes has contributed to a decline in patient health and an increase in violations of quality standards, and these declines appear to reflect cuts to front-line nursing staff—one component of efficiency improvements that also include higher bed utilization. The authors conclude: “[I]n the nursing home setting, it appears that high-powered profit-maximizing incentives can lead firms to renege on implicit contracts to provide high quality care, creating value for the firms at the expense of patients.”⁵⁴

During this year’s pandemic, these staffing challenges were heightened when some nursing aides ceased showing up for work at their nursing homes, often out of fear of contracting the coronavirus at work and bringing it home to their own families.⁵⁵ In one notable example, the

⁴⁹ Jeannie P. Cimiotti, Linda H. Aiken, et al., *supra* note 47.

⁵⁰ Charlene Harrington, Christine Kovner, et al., *Experts Recommend Minimum Nurse Staffing Standards for Nursing Facilities in the United States*, THE GERONTOLOGIST (2000), <https://aspe.hhs.gov/basic-report/state-initiated-nursing-home-nurse-staffing-ratios-annotated-review-literature#Harrington2>.

⁵¹ Sophie Quinton, *supra* note 45.

⁵² Atul Gupta, Sabrina Howell, et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes*, NYU Stern School of Business, (Feb. 13, 2020), <https://ssrn.com/abstract=3537612>.

⁵³ *Id.*

⁵⁴ *Id.* See also GAO, *Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, GAO-11-571 (Jul. 15, 2011), <https://www.gao.gov/products/GAO-11-571>.

⁵⁵ Sophie Quinton, *supra* note 45.

residents of a Riverside, California nursing home had to be evacuated when all but one of the facility’s 13 certified nursing assistants did not show up for work for two consecutive days.⁵⁶

Research supports the idea that nursing homes with more registered nurses (RNs) have the potential to better control COVID-19 case and fatality rates. For example, one recent study found that, among nursing homes with at least one confirmed COVID-19 case, “every 20-minute increase in RN staffing (per resident day) was associated with 22% fewer confirmed cases.”⁵⁷ Among facilities with at least one death, “every 20-minute increase in RN staffing significantly predicted 26% fewer COVID-19 deaths.”⁵⁸

2. The Challenge Posed by Characteristics of the Resident Population

It is by now well known that the risk of being hospitalized for COVID-19 increases with age, and that the elderly are far more susceptible, on average, than the young to the adverse effects of this virus.⁵⁹ Nursing home residents appear to be at even greater risk than other seniors of serious illness and death due to COVID-19.⁶⁰

As explained by the CDC:

“As you get older, your risk for severe illness from COVID-19 increases. For example, people in their 50s are at higher risk for severe illness than people in their 40s. Similarly, people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s.”⁶¹

⁵⁶ *More Than 80 Evacuated From Nursing Home During Crisis*, NBC LOS ANGELES (Apr. 8, 2020), <https://www.nbclosangeles.com/news/coronavirus/riverside-county-nursing-home-coronavirus-covid-19-evacuation/2342768/> (describing the evacuation of over 80 patients at a skilled nursing facility in Riverside, California after most of its certified nursing assistants did not show up to care for sick patients two days in a row).

⁵⁷ Yue Li, Helena Temkin-Greener, et al, *COVID-19 Infections and Deaths among Connecticut Nursing Home Residents: Facility Correlates*, J. OF AMER. GERIATRICS SOCIETY (Jun. 18, 2020), <https://doi.org/10.1111/jgs.16689>.

⁵⁸ *Id.*

⁵⁹ Sarah Harrison, *Why has COVID-19 hit seniors so hard?* WIRED (Jun. 2020), <https://www.wired.com/story/why-has-covid-19-hit-seniors-so-hard/> (noting that older people are more likely to contract the disease, to suffer from it severely, and to have a more difficult recovery).

⁶⁰ HUB Staff Report, *supra* note 35 (“Older people and people with multiple co-morbidities tend to have more severe symptoms if they contract COVID-19. Residents of nursing homes tend to be frailer, have more functional limitations, and have more chronic and complex conditions than other older adults. Based on the data that we have about COVID-19, that puts nursing home residents at highest risk for serious illness as a result of exposure”).

⁶¹ *Id.*

The typical nursing home resident is at the upper end of the age spectrum. (Almost half are at least 85,⁶² while relatively few are younger than 65 years.⁶³ About 15% of people who are at least 85 years old live in nursing homes, compared with about 1.1% of people between the ages of 65 and 74 years.)⁶⁴ The fatality rate due to COVID-19 is even higher than the risk for severe illness from COVID-19, among the elderly:⁶⁵

“The [COVID-19] case fatality rate increases “from 3% to 5% between 65 and 74 years, 4% to 11% between 75 and 84 years, and 10% to 27% above 85 years and people aged 65 years and older account for 45% of hospitalizations, 53% of intensive care unit (ICU) admissions, and 80% of deaths.”⁶⁶

Many seniors, especially those above the age of 80, are frail or have chronic, preexisting conditions that increase their susceptibility to COVID-19.⁶⁷

- First, as people age, they may experience “immunosenescence, a slow deterioration of the immune system that is a normal part of aging.”⁶⁸

⁶² HEALTH IN AGING, Webpage (last visited Sept. 21, 2020), <https://www.healthinaging.org/age-friendly-healthcare-you/care-settings/nursing-homes>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See, e.g., Sharon Begley, *Who is getting sick, and how sick? A breakdown of coronavirus risk by demographic factors*, STATNEWS (Mar. 3, 2020), <https://www.statnews.com/2020/03/03/who-is-getting-sick-and-how-sick-a-breakdown-of-coronavirus-risk-by-demographic-factors/>.

⁶⁶ David G. Le Couteur, Rozalyn M. Anderson, et al., *COVID-19 Through the Lens of Gerontology*, 20 GERONTOL. A. BIOL. SCI. MED. SCI. (Mar. 31, 2020), 1–2, <https://academic.oup.com/biomedgerontology/advance-article/doi/10.1093/gerona/glaa077/5813435>.

⁶⁷ Sarah Harrison, *supra* note 59 (citing Safiya Richardson, Jamie S. Hirsch, et al, “Presenting Characteristics, Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New York City Area,” JAMA (Apr. 22, 2020), file:///C:/Users/ef44324/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Download/s/jama_richardson_2020_oi_200043.pdf. See also Nadja Popovich, Anjali Singhvi, and Matthew Conlen, *Where Chronic Health Conditions and Coronavirus Could Collide*, N.Y. TIMES (May 18, 2020), (reporting that the “coronavirus has been particularly brutal for seniors, who are hospitalized and die at higher rates than younger people with the virus. . . [and while] underlying health conditions appear to increase the risk of serious illness across age groups[,] heart disease and hypertension are more common among older people”), available at <https://www.nytimes.com/interactive/2020/05/18/us/coronavirus-underlying-conditions.html>.

⁶⁸ Sarah Harrison, *supra* note 59; Yue Li, Helena Temkin-Greener, et al, *supra* note 57.

- Second, some seniors have chronic conditions, such as diabetes and hypertension,⁶⁹ both of which are associated with greater expression of a protein on human cells to which the coronavirus attaches before replicating.⁷⁰
- Third, chronic, low-grade inflammation, which is common among many seniors, can increase the risk of developing a condition, “cytokine storm,” which causes the immune system to go haywire and damage the body’s healthy organs in severe COVID-19 cases.⁷¹

In sum, the vast majority of residents of our country’s nursing facilities have compromised immune systems, a chronic health condition or other issues associated with aging that puts them at severe risk during a pandemic.

Residents with dementia pose an additional challenge for nursing home personnel during the pandemic.⁷² Their condition makes it more difficult to communicate their symptoms, which means that they can spread the virus unwittingly.⁷³ Because this population also may not appreciate why social distancing is necessary, they “can present challenging behaviors when staff attempt to enforce such restrictions.”⁷⁴

3. The Challenge Posed by Close Living Quarters: “An Ideal Environment for Acquisition and Spread of Infection”

Long-term care facilities, particularly nursing homes, offer an ideal environment for the spread of COVID-19 and other pathogens, experts say.⁷⁵ This is primarily for two reasons. First,

⁶⁹ *Id.* (citing Safiya Richardson, Jamie S. Hirsch, et al, *Presenting Characteristics, Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New York City Area*, JAMA (Apr. 22, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2765184>).

⁷⁰ *Id.*; Sharon Begley, *supra* note 65 (“China CDC’s analysis of 44,672 patients found that the fatality rate in patients who reported no other health conditions was 0.9%. It was 10.5% for those with cardiovascular disease, 7.3% for those with diabetes, 6.3% for people with chronic respiratory diseases such as COPD, 6.0% for people with hypertension, and 5.6% for those with cancer.”).

⁷¹ Sarah Harrison, *supra* note 59.

⁷² TEXAS HEALTH AND HUMAN SERVICES COMMISSION, Webpage, “COVID-19 Response for Nursing Facilities,” Version 3.5 (Aug. 18, 2020), available at <https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/long-term-care/nf/covid-response-nursing-facilities.pdf>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Larry J. Strausbaugh, Shirin R. Sukumar, et al., *supra* note 34. As noted by *Nursing Times*, “in any shared living space such as care homes, there are also shared infectious agents – usually bacteria or viruses – that from time to time cause infection outbreaks.” Evonne T. Curran, “Infection outbreaks in care homes: prevention and management,” NURSING TIMES (Aug. 14, 2017), <https://www.nursingtimes.net/clinical-archive/infection-control/infection-outbreaks-in-care-homes-prevention-and-management-14-08-2017/>.

residents occupy close quarters, sharing the same air, space, food, and equipment in which these organisms are present.⁷⁶ Second, nursing home residents require one-on-one assistance in performing daily tasks, such as eating, dressing, and bathing.⁷⁷

Nursing home care must be delivered in person during a pandemic, while many other health services can be provided using telehealth or audio devices.⁷⁸ The one-on-one contact between nursing home residents and care workers increases the likelihood of residents contracting the virus from aides, or of infected residents passing the virus to care workers.⁷⁹ As explained by a geriatric nurse practitioner:

“Nursing home residents often require help with things like using the toilet, getting in and out of bed, and getting dressed. Social distancing and hand-washing are the best ways to prevent spread of the virus, but these essential person-to-person interactions are still going to have to happen, meaning that residents and staff may be more likely than other people to spread the virus to one another.”⁸⁰

B. ADDITIONAL CHALLENGES CONFRONTING SELECTED NURSING FACILITIES

As noted above, virtually all nursing homes face similar issues that, if ignored, can lead to spiraling rates of infection among residents and care workers, especially during a pandemic. These risks are well documented in academic research on these facilities’ frail and elderly population. Such risks were reasonably foreseeable, for the most part, to geriatricians.⁸¹

⁷⁶ Evonne T. Curran, “Infection outbreaks in care homes: prevention and management,” *NURSING TIMES* (Aug. 14, 2017), <https://www.nursingtimes.net/clinical-archive/infection-control/infection-outbreaks-in-care-homes-prevention-and-management-14-08-2017/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ HUB Staff Report, *supra* note 35.

⁸¹ “Why have nursing homes been such hot spots in the pandemic, and were there warning signs? ‘There were very few geriatricians around the country that didn’t know what was about to happen,’ Michael Wasserman, MD, president of the California Association of Long Term Care Medicine, told CHCF’s Steven Birenbaum in a recent interview. On March 10, Wasserman told a major broadcast network, ‘This is the greatest threat to nursing home residents that we have seen in many years, if not ever.’” Xenia Shih Bion, California Health Foundation, *Why Nursing Homes Became COVID Hotspots* (Jul. 13, 2020), available at <https://www.chcf.org/blog/why-nursing-homes-become-covid-19-hot-spots/>.

In addition to these common challenges shared by most, or virtually all, facilities, some confronted *additional* issues during the pandemic that strained their ability to respond, putting residents as well as care workers at even higher risk during this pandemic. These additional issues, which probably were less foreseeable to facility owners and operators, called for a heightened emergency response during the COVID-19 outbreak. They are outlined below.

1. Challenges Posed by the Presence of COVID-19 in the Surrounding Community, Especially for Larger Facilities

Preliminary research shows that the risk a nursing home’s staff and residents will become infected increases markedly when COVID-19 is present in the surrounding community. An analysis of a week-long snapshot of data collected from 8,900 nursing homes indicates that average rates of COVID-19 were nearly twice as high in counties where facilities reported COVID-19 as those without reported cases.⁸²

Even though many COVID-19 hotspots are in urban areas, the virus is not confined to large cities, data suggests.⁸³ But additional data shows a possible correlation between COVID-19 transmission and facility size: i.e., as facility size increases, the risk that COVID-19 will be present in the facility reportedly also increases.⁸⁴ The introduction of the virus to a nursing home, especially larger ones, typically is due to the regular coming and going of asymptomatic or pre-symptomatic staff and residents, who may be unwitting contributors to the spread of the virus, according to preliminary data collected in one study.⁸⁵

Other large institutional settings, such as Federal prisons, in the United States, have been similarly hard hit by COVID-19. For example, as reported by the *Los Angeles Times*, more than 700, or nearly 70%, of inmates at a prison in Lompoc, California became infected with the coronavirus. That facility, along with another on Terminal Island in San Pedro, California (where more than 600 inmates contracted the coronavirus), account for about 46% of all Federal inmates who have tested positive nationwide.⁸⁶

⁸² Paula Chatterjee, Sheila Kelly, et al, Research Letter: “Characteristics and Quality of US Nursing Homes Reporting Cases of Coronavirus Disease 2019 (COVID-19), JAMA NETWORK (July 2020) (“The largest difference between nursing homes with and without COVID-19 cases was observed in county level rates of COVID-19, suggesting that when the surrounding population case rate is high, area nursing homes are at a high risk of infections.”), available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768763> .

⁸³ HUB Staff Report, *supra* note 35.

⁸⁴ Brian E. McGarry, David C. Grabowski, et al, *supra* note 36.

⁸⁵ *Id.*

⁸⁶ Anita Chabria, Ben Welsh, et al, *Senior care homes source of nearly half of all coronavirus-related deaths, data show*, LOS ANGELES TIMES (May 8, 2020), <https://www.latimes.com/california/story/2020-05-08/california-coronavirus-deaths-nearly-half-linked-to-elder-care-facilities>.

2. Challenges Posed by Mobility of Care Workers

Compounding the COVID-19 transmission risk posed by the coming and going of individuals in congregate living facilities⁸⁷ is the related issue of care workers who hold second jobs⁸⁸ or work at multiple nursing homes. Nursing home workers employed at multiple facilities can unwittingly carry a virus from one facility to another, preliminary research strongly suggests.⁸⁹ The severe staffing challenges faced by many nursing homes, which have only been exacerbated by the pandemic, probably further increases the likelihood that care workers will rotate among multiple facilities during the emergency period.

According to one recent study published in the *Journal of Infection*, staff working at more than one London nursing home during the peak of the United Kingdom’s COVID-19 outbreak had at least triple the risk of infection.⁹⁰ (Deaths linked to care, or nursing, homes accounted for 54% of all deaths due to COVID-19 in England and Wales, as of May 1st).⁹¹ The coming and going of staff was a factor in the high nursing home fatality rate in Canada as well.⁹²

Another study, published July 22nd, found seven percent of smartphones appearing in one of our nation’s nursing homes also appeared in at least one other nursing home (even after most nursing homes had imposed visitation restrictions in response to Federal guidance issued in March).⁹³ This study, which relied on geolocation data from 30 million smartphones, also found

⁸⁷ Larry J. Strausbaugh, Shirin R. Sukumar, *supra* note 34.

⁸⁸ Katie Reilly, “It’s Getting Worse.” *Nursing Home Workers Confront Risks in Facilities Devastated by Coronavirus*, *TIME Magazine* (May 29, 2020) (noting that “many nursing home employees work second jobs, which increases their risk of contracting the virus and unwittingly carrying it to residents.”), <https://time.com/5843893/nursing-homes-workers-coronavirus/>.

⁸⁹ Kimiko de Freytas-Tamura, “They Call Me A Criminal:” *Nursing Home Workers Who May Spread the Virus*, *N.Y. TIMES* (Sep. 10, 2020) (“Health policy analysts say that poorly paid staff members working two or more nursing home jobs may be significant contributors—usually unwittingly—to the spread of the virus.”).

⁹⁰ Shamez Ladhani, J. Yimmy Chow, et al., *Increased risk of SARS-CoV-2 infection in staff working across different care homes: enhanced COVID-19 outbreak investigations in London care homes*, *JOURNAL OF INFECTION* (Jul. 2020), <https://www.journalofinfection.com/action/showPdf?pii=S0163-4453%2820%2930508-9>. See also Mary Van Beusekom, “COVID-19 risk factors vary for nursing home staff, residents,” Univ. of Minnesota, Ctr. for Infectious Disease Research and Policy, <https://www.cidrap.umn.edu/news-perspective/2020/07/covid-19-risk-factors-vary-nursing-home-staff-residents> (July 29, 2020),

⁹¹ *Id.*

⁹² Amanda Coletta, *supra* note 18 (indicating that the virus devastated Canadian nursing homes in part because staff worked at multiple nursing homes, and, in some areas, such as Ontario, “public health officials, faced with limited testing kits, initially advised against testing all long-term care residents, and told health aides they needed personal protective equipment only if their facilities had outbreaks.”).

⁹³ *Id.*; see CMS, Press Release, “CMS Announces New Measures to Protect Nursing Home Residents from COVID-19 (Mar. 13, 2020), <https://www.cms.gov/newsroom/press-releases/cms-announces-new-measures-protect-nursing-home-residents-covid-19>.

that each nursing home in the United States has, on average, connections with 15 other facilities.⁹⁴ The researchers concluded that “eliminating staff linkages between nursing homes’ could reduce coronavirus infections in nursing homes **by 44 percent**.”⁹⁵

Citing this same research, a media report this month indicates that movement of staff from one nursing home to another provides “*the most likely explanation*” for continued COVID-19 outbreaks at some nursing homes, at least in Florida.⁹⁶

“Florida, which has one of the country’s highest populations of older people, has for several months had a strict ban on visitations and prohibited hospitalized Covid-19 patients from returning to nursing homes until they had twice tested virus-free. Yet new outbreaks at the state’s nursing homes have continued to emerge, suggesting that staff members — especially those who travel from one facility to another — are the most likely explanation.”⁹⁷

Yet another study suggests that employees at a Kirkland, Washington nursing home—the site of the nation’s first COVID-19 nursing home outbreak—spread the virus to at least three other facilities.⁹⁸ The study found that staff who worked in this facility, Life Care, also worked at two of three nursing homes that were included in their study.⁹⁹ (The third facility recently had admitted two former Life Care residents.) As further noted by the *Wall Street Journal*, in the Kirkland facility, some staff “came to work even though they had symptoms,” which “set off a deadly chain reaction that led to 129 cases within 11 days, killing more than 27% of the residents who were sickened...”¹⁰⁰

Recognizing the risk that visitors could introduce the virus into nursing homes, the CDC issued guidance in March that called for limiting the entry of visitors and nonessential healthcare

⁹⁴ M. Keith Chen, Judith A. Chevalier, and Elisa F. Long, Working Paper 27608: “Nursing Home Staff Networks and COVID-19,” NAT’L BUR. OF ECONOMIC RESEARCH (July 20, 2020), *available at* <https://www.nber.org/papers/w27608>. The authors add that “[t]he full extent of staff connections between nursing homes—and the crucial role these connections serve in spreading a highly contagious respiratory infection—is currently unknown given the lack of centralized data on cross-facility nursing home employment.”

⁹⁵ *Id.* [emphasis added].

⁹⁶ Kimiko de Freytas-Tamura, *supra* note 89 [emphasis added].

⁹⁷ *Id.*

⁹⁸ Betsy McKay, *supra* note 16.

⁹⁹ Temet M. McMichael, Dustin W. Currie, et al., *Epidemiology of Covid-19 in a Long-Term Care Facility in King County, Washington*, NEW ENG. J. OF MEDICINE (Mar. 27, 2020), https://www.nejm.org/doi/full/10.1056/NEJMoa2005412?query=featured_home.

¹⁰⁰ *Id.* (citing a study published in CDC’s MORBIDITY AND MORTALITY WEEKLY REPORT).

personnel into nursing homes (except in compassionate care and end of life situations, to prevent transmission).¹⁰¹ To date, neither the CDC nor CMS have restricted movement of nursing home personnel or government survey personnel across multiple nursing homes.

3. Challenges Posed by Facility Location

Facilities in rural or remote locations face challenges during the pandemic that are different from those faced by facilities in urban locations. Those in urban areas face a higher COVID-19 exposure risk from periodic traffic in and out of the facility,¹⁰² and their staff shortages are due to “competitive job markets,” while those in rural locations “have less health care system support, might not have local health authorities, and have smaller staffing pools, making it harder to cover shortages that result from probable exposure.”¹⁰³ Facilities in rural areas also might find it more difficult to locate equipment, such as personal protective equipment and ventilators, which are important in caring for COVID-19 patients.¹⁰⁴

4. Financial Challenges for the Nursing Home Sector

The Medicare Payment Advisory Commission (“MedPAC”) confirmed in September that the nursing home sector has sustained losses of approximately \$2 billion per month during this public health emergency period.¹⁰⁵ (MedPAC added that relief assistance provided to this sector through the *Coronavirus Relief and Economic Security Act*, signed by President Trump, has helped offset these losses in the short-term, but nursing homes face ongoing financial challenges.) A spokesman for this sector’s largest trade association also advised the Finance Committee staff that the losses to the sector may be even higher, or roughly \$3 billion per month.

¹⁰¹ Sophie Quinton, *supra* note 45 (“For the most part, the only people who should be going into nursing homes and assisted living facilities at this point are essential staff. There are a few exceptions to that, such as in the case of compassionate care. If someone is not expected to live many more days or weeks, a family member may be permitted to visit. Also, for some people who have behavioral manifestations of dementia, for example, it may be necessary to permit a familiar one-on-one caregiver to be with that person.”).

¹⁰² Amy Mendoza, *Facility Location Determines COVID Outbreaks, Researchers Say*, PROVIDER, (May 12, 2020) (citing preliminary research showing that “larger facilities located in urban areas with large populations, particularly in counties with a higher prevalence of COVID-19 cases, were more likely to have reported cases.”), <http://www.providermagazine.com/news/Pages/2020/MAY/Facility-Location-Determines-COVID-Outbreaks,-Researchers-Say.aspx>.

¹⁰³ TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *supra* note 72.

¹⁰⁴ *Id.*

¹⁰⁵ MEDICARE PAYMENT ADVISORY COMMISSION, [Presentation](http://medpac.gov/docs/default-source/meeting-materials/medpac_covid_sept_2020_rev.pdf?sfvrsn=0): “The coronavirus pandemic and Medicare” (Sep. 2020) at 11, available at http://medpac.gov/docs/default-source/meeting-materials/medpac_covid_sept_2020_rev.pdf?sfvrsn=0.

C. DIFFERENCES IN NURSING HOME PREPAREDNESS AND RESPONSE

The foregoing discussion of challenges facing nursing homes during this pandemic leads us to several questions. First, at the outset of the outbreak, how well prepared for this pandemic were most nursing homes in the United States? Second, what happened during that initial phase: i.e., what steps did most of our nation’s nursing facilities take; were these steps sufficient; and did the facilities at highest risk take additional precautions after the World Health Organization declared a pandemic? Some nursing homes seemed better prepared before the initial phase of the pandemic and better positioned to handle the later phase of the outbreak.¹⁰⁶

The first, most prominent, example we have of a nursing home’s response to the outbreak in the United States is Life Care Center of Kirkland, which made national headlines when dozens of its residents died from COVID-19. Long before that initial outbreak in this Washington State nursing home in February, ominous reports from around the globe predicted the likely challenges ahead for nursing homes in the United States.¹⁰⁷ Some gerontologists in the United States sounded the alarm about the risks of the novel coronavirus for the elderly.¹⁰⁸ By the end of March, the media was documenting for everyone else the brutal impacts of this pandemic on care workers and the elderly, frail residents of nursing homes.¹⁰⁹

¹⁰⁶ Blake Ellis and Melanie Hicken, “Nursing Home Workers Warned Government About Safety Violations Before COVID-19 Outbreaks and Deaths” CNN (May 14, 2020) (“The employees say they have been kept in the dark about outbreaks in their own facilities as they care for elderly and frail residents who are particularly susceptible to the disease. Some of the employees’ grievances, CNN found, were made just days or weeks before Covid-19 outbreaks and deaths were announced at the same facilities. Other complaints were lodged after management was allegedly well aware the virus was spreading throughout their facilities.”), <https://www.cnn.com/2020/05/14/us/nursing-home-workers-safety-coronavirus-invs/index.html>.

¹⁰⁷ See, e.g., Barbara Kollmeyer, *Coronavirus was devastating Europe’s nursing homes well before the U.S. Here are the lessons they learned*, MARKET WATCH (May 7, 2020), <https://www.marketwatch.com/story/coronavirus-was-devastating-europes-nursing-homes-well-before-the-us-here-are-the-lessons-they-learned-2020-05-07>. See also *Care homes across globe in spotlight over Covid-19 death rates*, THE GUARDIAN (Apr. 9, 2020), <https://www.theguardian.com/world/2020/apr/09/care-homes-across-globe-in-spotlight-over-covid-19-death-rates>.

¹⁰⁸ As reported by *Forbes*, on March 17, as the pandemic was just beginning to accelerate, at least one epidemiologist warned “that ‘even some so-called mild or common-cold-type coronaviruses have been known for decades [to] have case fatality rates as high as 8% when they infect people in nursing homes.’” Avrik Roy, *The Most Important Coronavirus Statistic: 42% of U.S. Deaths Are From 0.6% of The Population*, FORBES (May 26, 2020), <https://www.forbes.com/sites/theapothecary/2020/05/26/nursing-homes-assisted-living-facilities-0-6-of-the-u-s-population-43-of-u-s-covid-19-deaths/#1db2679774cd>.

¹⁰⁹ Judith Graham, *Geriatricians’ advice on what older adults need to do in coronavirus pandemic*, THE WASHINGTON POST (Mar. 28, 2020), https://www.washingtonpost.com/national/health/geriatricians-advice-on-what-older-adults-need-to-do-in-coronavirus-pandemic/2020/03/27/8b1c5506-6dee-11ea-a3ec-70d7479d83f0_story.html (data from China indicates “80 percent of deaths from COVID-19 occurred among people 60 and older.”)

1. How well prepared for this pandemic were most nursing homes in the United States?

Critics have suggested that some nursing home administrators were woefully unprepared for, and entirely mishandled, the COVID-19 pandemic.¹¹⁰ Others have adopted the contrary view that there are few “bad actors,” or that it was virtually inevitable that the asymptomatic and presymptomatic would introduce the virus to many nursing homes, especially larger facilities, in the United States.¹¹¹

In evaluating these competing views, it is worthwhile to consider three factors. First, the issues with which nursing homes in the United States have struggled are largely the same as those facing other countries. (Curiously, nursing homes in some other countries fared better, while others fared worse, than those in the United States in the initial phase of the pandemic.) Second, as noted below, government audits and investigative reporting hint that most of our nation’s nursing homes were not adequately prepared for this year’s pandemic. Third, as noted above, years before the outbreak of COVID-19 in a Kirkland, Washington nursing home last February, lapses in infection control and prevention were common in many facilities, and most nursing homes also struggled with persistent staffing shortages.

- **Comparative Experience of Other Countries**

In some respects, the challenges with which nursing homes in other countries struggled in the initial weeks of the pandemic strongly resemble the challenges now facing these same facilities in the United States. In Italy, for example, where nursing homes were hard hit by COVID-19 some months ago, public officials “learned that using nursing homes as convalescent facilities for people discharged from hospitals and recuperating from the virus was a costly mistake.”¹¹²

¹¹⁰ Binghui Huang, *Why were nursing homes devastated by the coronavirus? Low pay and staff shortages are among the reasons*, MORNING CALL (Jun. 1, 2020), <http://www.mcall.com/health/mc-hea-nursing-homes-coronavirus-deaths-20200619-ypsyovi56jfsdnwmqn6clhkq3a-story.html>; *New Jersey nursing home where 17 bodies were stuffed into tiny morgue hit with lawsuit; The suit alleges that Andover Subacute and Rehabilitation Center I and II did not take proper precautions to keep residents safe from COVID-19*, NBC NEWS (Sep. 2020), <https://www.nbcnews.com/news/us-news/new-jersey-nursing-home-where-17-bodies-were-stuffed-tiny-n1239567>.

¹¹¹ Ina Jaffe, *Why Were Some Nursing Homes Spared The Devastation of COVID-19? Depends Who You Ask*, NPR (June 26, 2020), <https://www.npr.org/2020/06/26/881935246/why-were-some-nursing-homes-spared-the-devastation-of-covid-19-depends-who-you-a>. E.g., David Grabowski, a professor of health policy at Harvard Medical School, and Tamara Konetzka, a professor at the University of Chicago, maintain that there is no evidence that quality ratings matter when it comes to COVID-19. *Id.*

¹¹² Barbara Kollmeyer, *supra* note 107. “This was a terrible error in Northern Italy and Lombardy ... many of these people were not completely healed, they were still infected with COVID and that accounted for the spreading of the disease in a very frail population.....” *Id.*

Note, however, that in a handful of other jurisdictions around the globe, there have been no COVID-19 fatalities in nursing homes.¹¹³ An example is Hong Kong. Its example shows that you can proactively institute measures in anticipation of an infectious disease outbreak, and thereby minimize transmission of the disease in nursing homes.

Hong Kong, which has 7.5 million people, reportedly revamped its infection control policies after the severe acute respiratory syndrome, or SARS, epidemic overwhelmed its nursing homes in 2003 (78 percent of facility residents who contracted SARS died).¹¹⁴ Its nursing homes now must have a designated, government-trained infection control officer and maintain at least a month’s supply of face masks and other PPE.¹¹⁵

“As soon as COVID-19 broke out in Hong Kong, in January of this year, its nursing homes halted nonurgent hospital trips among residents as well as family visitation... Nursing-home staffers donned masks as they cared for the residents. Any nursing-home residents who caught COVID-19 were isolated in hospital coronavirus wards—not in nursing homes—until they had tested negative for the virus at least twice. There was a human cost to the lack of family visits...; patients who had dementia deteriorated more quickly without social interaction. But nursing-home administrators were certain that if even *one* COVID-19 case snuck into a nursing home, it would spark a conflagration with tragic results.”¹¹⁶

- **Pre-Pandemic Infection Prevention and Control Deficiencies: “Widespread and Persistent”**

A July 2020 report by the Government Accountability Office (GAO) suggests that, in the years prior to this pandemic, many nursing homes had not adopted the infection control and prevention protocols that are critically important to curbing the spread of infectious disease.¹¹⁷ Examples of shortfalls identified by GAO include: not properly isolating sick residents, using improper handwashing techniques, and not wearing masks or using other personal protective

¹¹³ Olga Khazan, “The U.S. Is Repeating Its Deadliest Pandemic Mistake,” THE ATLANTIC (Jul. 6, 2020), <https://www.theatlantic.com/health/archive/2020/07/us-repeating-deadliest-pandemic-mistake-nursing-home-deaths/613855/>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ GAO, *Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic*, *supra* note 13. See also ASSOCIATED PRESS, *GAO-Nursing home flaws predated virus*, THE JOURNAL GAZETTE (May 21, 2020), <https://www.journalgazette.net/news/us/20200521/gao-nursing-home-flaws-predated-virus>.

equipment. GAO added that almost half of nursing facilities with these citations were cited multiple times over the course of several years--“an indicator of persistent problems.”¹¹⁸

As of February 2020, the State agencies that conduct nursing home inspections cited “more than 6,600” of the nation’s nursing homes “([or] nearly 43 percent) for infection prevention and control program deficiencies, including lack of a correction plan in place for these deficiencies,” according to the Office of Inspector General (OIG) at the Department of Health and Human Services (HHS).¹¹⁹ Because we do not know the extent to which nursing homes across the nation have adequate internal controls to curb the spread of infectious disease, the HHS OIG has initiated an audit into this issue:

“To reduce the likelihood of contracting and spreading COVID-19 at these nursing homes, effective internal controls must be in place. Our objective is to determine whether selected nursing homes have programs for infection prevention and control and emergency preparedness in accordance with Federal requirements.”¹²⁰

Shortfalls in the area of infection control and prevention became painfully apparent earlier this year, during the nation’s first outbreak of COVID-19 in a Washington State nursing home in February. As noted in one media report:

“Dozens of its workers received coronavirus diagnoses, suggesting that the center’s frantic efforts to sanitize the building, quarantine residents and shield staff members with gowns and visors may have come too late. ‘This caught them completely off guard,’ Jim Whitney, the medical services administrator for the nearby Redmond Fire Department, said. ‘They just were not prepared for what was happening. None of us were.’”¹²¹

In addition, although many or most infection control and prevention procedures—e.g., proper handwashing hygiene, proper disposal of masks and other protective equipment, daily cleaning of touched surfaces—are neither sophisticated nor particularly costly to implement, some nursing homes have not corrected problems in this area. This was the most commonly cited deficiency in

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4 (“In each individual year from 2013 through 2017, the percent of surveyed nursing homes with an infection prevention and control deficiency ranged from 39 percent to 41 percent. In 2018 and 2019, we found that this continued with about 40 percent of surveyed nursing homes having an infection prevention and control deficiency cited each year. About half—6,427 of 13,299 (48 percent)—of the nursing homes with an infection prevention and control deficiency cited in one or more years of the period we reviewed had this type of deficiency cited in multiple consecutive years from 2013 through 2017. This is an indicator of persistent problems.”).

¹²⁰ HHS OIG, Webpage (last visited Sept.21, 2020) (describing HHS OIG Audit W-00-20-31545 to be released in calendar year 2020), <https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000471.asp>.

¹²¹ Jack Healey and Serge Kovaleski, *The Coronavirus’s Rampage Through A Suburban Nursing Home*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html>.

nursing facilities in recent years, according to GAO, with 82% of nursing homes having at least one such infection control and prevention deficiency.¹²²

Perhaps for this reason, even prior to the COVID-19 outbreak, tens of thousands of people died in nursing homes and other health care facilities *each and every year* due to infectious disease.¹²³ Respiratory infections (often due to influenza viruses) and gastrointestinal infections (typically caused by noroviruses) reportedly account for many of the fatalities attributable to infections in nursing homes.¹²⁴ As noted by one geriatric nurse practitioner:

“Federal and state regulations typically require that infection prevention, surveillance, and management be part of new staff orientation and ongoing quality assurance and improvement efforts. With that said, the inspector general recently reported that infections are one of the primary adverse events that occur in nursing facilities. Infection control in long-term care settings is a concern that has existed for years, and the current outbreak is bringing it into sharper focus.”¹²⁵

According to the California Health Care Foundation, nursing homes in California were especially hard hit by the coronavirus earlier this year, partly because nearly 70% of California nursing homes did not have and were not implementing an infection control program prior to the pandemic.¹²⁶ This excerpt from a May 2020 news story about an Oregon nursing home confirms that infection control and prevention posed a challenge elsewhere during the pandemic too:

“In April, the DHS [Oregon Department of Human Services] filed a scathing review of the conditions at the nursing home, located at 6003 SE 136th Ave [in Portland]. Officials saw numerous safety violations, including but not limited to staff not washing their hands, staff being limited to using one mask per shift, staff not being screened before entering the

¹²² GAO, *Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic*, *supra* note 117.

¹²³ See, e.g., David Heitz, “99,000 Americans Die of Healthcare-Acquired Infections Every Year,” *Health News* (July 2013), <https://www.healthline.com/health-news/aging-healthcare-acquired-infections-kill-nearly-a-hundred-thousand-a-year-072713>.

¹²⁴ See, e.g., Evonne T. Curran, “Infection outbreaks in care homes: prevention and management,” *NURSING TIMES* (Aug. 14, 2017), <https://www.nursingtimes.net/clinical-archive/infection-control/infection-outbreaks-in-care-homes-prevention-and-management-14-08-2017/> (citing (Utsumi et al, 2010; Strausbaugh et al, 2003).

¹²⁵ HUB Staff Report, *supra* note 35.

¹²⁶ Xenia Shih Bion, “Why Nursing Homes Became COVID Hotspots,” CALIFORNIA HEALTH FOUNDATION (July 13, 2020), (<https://www.chcf.org/blog/why-nursing-homes-become-covid-19-hot-spots/>). The article also cites other factors, noting that inadequate PPE, inadequate rapid testing, short staffing, also compounded the infection control problems. See also Cal Matters, “COVID Cases Swell in Nursing Homes with Poor Track Records,” (updated July 23, 2020), available at <https://calmatters.org/health/coronavirus/2020/06/nursing-homes-coronavirus-deaths-infections-inspections-violations-kingston-california/>.

facility, no overnight housekeeping, and care plans not being updated for at least two residents who had tested positive for the coronavirus. Staff at the home told DHS officials they received no training regarding COVID-19 and preventing the spread of the virus.”¹²⁷

A question arises as to why these facilities did not prioritize infection control and prevention long before the pandemic, given the risks of infections to their frail, elderly residents (especially since hospitals apparently made significant advances in this area years ago).¹²⁸ One answer could be that some regulatory agencies do not classify infection control violations among the most serious health code violations. For example, in some States, the majority of infection control violations do not result in financial penalties.¹²⁹

To confront this serious issue, the CDC has called for use of cohorting strategies (involving the isolation of the sick from the uninfected) in nursing homes,¹³⁰ in addition to its existing infection prevention and control recommendations, which include “universal source control measures, visitor restrictions; screening of residents and HCP; and promptly notifying the health department” of suspected COVID-19 cases.¹³¹ In addition, the executive branch recently launched two infection control initiatives. One, by the HHS Agency for Healthcare Research and Quality (AHRQ), involves the launch of an infection control learning network through Project ECHO (a consortium of about 250 health system “hubs” located across the country). The second, by CDC in collaboration with CMS, involves the creation of a new, 23-module infection control training program, free of charge for personnel of nursing homes across the nation.¹³²

¹²⁷ KGW8 Staff, *Portland nursing home suspended, residents moved after 28 COVID-19 deaths*, KGW8 (May 2020), <https://www.kgw.com/article/news/local/portland-nursing-home-shut-down-by-the-state-due-to-covid-19-outbreak/283-524bf098-e38d-4349-843b-9dacfc5084dc>.

¹²⁸ David Heitz, *supra* note 123 (“Most hospitals have infection prevention specialists—nurses and doctors doing surveillance to identify, track, and prevent infections,” Fraser said. ‘They have education programs and policies and procedures to enhance hand hygiene and systems and processes to reduce the risk of central line associated infections, ventilator associated pneumonia, surgical site infections, and urinary tract infections.’”), <https://www.healthline.com/health-news/aging-healthcare-acquired-infections-kill-nearly-a-hundred-thousand-a-year-072713#Its-All-About-the-Money>.

¹²⁹ Binghui Huang, *supra* note 110 (noting that “the majority of infection control violations do not result in financial penalties, according to a ProPublica database of nursing home inspections about the last three years”). See also, Alex Spanko, *CMS to Increase Penalties for Infection Control Violations*, SKILLED NURSING NEWS (June 1, 2020), <https://skillednursingnews.com/2020/06/cms-to-increase-penalties-for-infection-control-violations-in-nursing-homes-reports-26000-covid-19-deaths/>

¹³⁰ CDC, Webpage, “Responding to Coronavirus (COVID-19) in Nursing Homes” (updated Apr. 30, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/nursing-homes-responding.html>.

¹³¹ *Id.* (citing CDC, Webpage, “Preparing for COVID-19 in Nursing Homes” (updated June 25, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>).

¹³² CDC, Webpage, “Infection Prevention Training” (last visited Sep. 21, 2020), available at <https://www.cdc.gov/longtermcare/training.html>.

- **Staffing Shortages: “Totally Unsafe”**

A study published in *Health Affairs* found that, as of early July, at least one in five nursing facilities faced a staff shortage or severe shortage of PPE, and such shortages had not meaningfully improved since late May 2020.¹³³ During the emergency period, staff absenteeism and the quarantining of infected staff have only exacerbated pre-pandemic staffing shortages, other studies indicate.¹³⁴

Pennsylvania is an example of one State in which nursing homes faced chronic staffing shortages long before this year’s pandemic. The State auditor unearthed serious staffing deficiencies several years ago, and health officials committed in 2016 to make reforms, but media reports (citing a 2019 report by the State auditor) strongly hint that not that much has changed.¹³⁵ Meanwhile, nearly 70% of COVID-19 fatalities in Pennsylvania are linked to nursing homes or other long-term care facilities.¹³⁶ By one account:

“Pennsylvania’s already low minimum staffing requirements, long criticized as ‘totally unsafe,’ were exacerbated by the pandemic.”¹³⁷ During the pandemic, these staffing issues in Pennsylvania reportedly were compounded by “false starts,” such as an early plan to dispatch strike teams to struggling nursing homes, which was abandoned, and “misinformation.”¹³⁸

More recently, eight longtime employees at one Pennsylvania facility came forward to publicly voice concerns that residents were not being bathed or showered, were sitting in soiled or wet briefs, and were falling out of beds or wheelchairs.¹³⁹ State inspection records reportedly showed that multiple complaints were made against the facility during this year’s national

¹³³ Maggie Flynn, *At Least 1 in 5 Nursing Home Report ‘Severe Shortage’ of Staff and PPE, with No Progress Since May*, SKILLED NURSING NEWS (Aug. 20, 2020) (citing Brian E. McGarry, David C. Grabowski and Michael L. Barnett, *Severe Staffing And Personal Protective Equipment Shortages Faced By Nursing Homes During The COVID-19 Pandemic*, HEALTH AFFAIRS (Aug. 20, 2020)), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.01269?utm_medium=press&utm_source=mediaadvisory&utm_campaign=CovidFasttrack&utm_content=McGarry).

¹³⁴ See, e.g., Seshadri Sandhya, Cathleen Concannon, et al., “*It’s like fighting a war with rocks*”: *Nursing home healthcare workers’ experiences during the COVID-19 pandemic*, INFECTION CONTROL & HOSPITAL EPIDEMIOLOGY 1-2 (Aug. 5, 2020), <https://doi.org/10.1017/ice.2020.393>.

¹³⁵ Rebecca Moss, *supra* note 15.

¹³⁶ *Id.* (noting that “Pennsylvania’s already low minimum staffing requirements, long criticized as “totally unsafe,” were exacerbated by the pandemic”).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Angie Moreschi, *Nursing home employees blow whistle on ‘poor care’ during COVID*, WPXI (Sep. 2, 2020), <https://www.wpxi.com/news/investigates/nursing-home-employees-blow-whistle-poor-care-during-covid/252QAJFR3NBZXARXUTVVJ73CJY/>.

emergency, but no disciplinary action had been taken by the health department.¹⁴⁰ As noted by the media: “The women say the care issues are the direct result of staffing shortages being made worse by the COVID-19 crisis and say the company is not doing enough to bring on more nurse’s aides.”¹⁴¹

A study of Connecticut data by researchers at the University of Rochester also found a correlation between lower nurse staffing levels and higher rates of confirmed COVID-19 cases and deaths in nursing facilities.¹⁴² This study also found a link between poorer quality scores and higher concentrations of disadvantaged residents with the presence of COVID-19:

“Analyses of the data showed that long-term care facilities with higher concentrations of disadvantaged residents, including Medicaid residents and racial and ethnic minorities, lower nurse staffing levels, particularly registered nurses (RN), and lower scores on CMS five-star quality measures, had higher rates of confirmed COVID-19 cases and deaths. Higher nurse staffing ratios in particular was strongly associated with fewer cases and deaths.... ‘Our findings of the strong negative association between RN staffing and the number of COVID-19 cases and deaths in nursing homes are consistent with research that has demonstrated that increased nursing levels are key to an institution’s ability to respond to outbreaks of emerging infections.’”¹⁴³

In April, Chairman Grassley voiced concerns to the CMS Administrator about COVID-19 issues in nursing homes, including about the importance of tracking and promptly reporting cases.¹⁴⁴ CMS announced on April 19th, two days after receiving Grassley’s April 17th letter,¹⁴⁵ that all nursing homes would be required to submit COVID-19 data directly to the CDC.¹⁴⁶ An

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Univ. of Rochester Medical Center, Webpage, “COVID-19 Toll in Nursing Homes Linked to Staffing Levels and Quality” (Jun. 18, 2020), available at <https://www.urmc.rochester.edu/news/story/covid-19-toll-in-nursing-homes-linked-to-staffing-levels-and-quality>.

¹⁴³ *Id.*

¹⁴⁴ Senator Charles E. Grassley, Press Release: “Grassley Seeks Details of Federal Response to Coronavirus in Nursing Homes” (Apr. 17, 2020), available at <https://www.finance.senate.gov/chairmans-news/grassley-seeks-details-of-federal-response-to-coronavirus-in-nursing-homes>

¹⁴⁵ Letter from Chm. Charles E. Grassley to The Hon. Alex Azar, Secretary of DEP’T OF HEALTH AND HUMAN SERVICES (hereinafter “HHS”) and The Hon. Seema Verma, Administrator of CMS (dated Apr. 17, 2020), available at <https://www.finance.senate.gov/imo/media/doc/HHSCoVIDLetter17Apr2020Final.pdf>.

¹⁴⁶ CMS, Press Release: “Trump Administration Announces New Nursing Homes COVID-19 Transparency Effort” (Apr. 19, 2020), available at <https://www.cms.gov/newsroom/press-releases/trump-administration-announces-new-nursing-homes-covid-19-transparency-effort>.

analysis of the data collected by CDC reportedly shows similar associations between nursing home quality and staffing and coronavirus infection rates and deaths.¹⁴⁷

- **Oversight by State Agencies: Wide Variations**

States have a leading role to play in detecting and correcting problems in the nursing home sector. This oversight is of course conducted in partnership with the Federal government, with respect to facilities that participate in the Medicare and Medicaid programs, but each State has broad responsibility for the following:

- First, government licensing of all nursing homes, regardless of whether a facility participates in Medicare and Medicaid, is a State responsibility. Each nursing home administrator must be licensed in the State in which their facility is located before they can seek certification to participate in Federal health care programs.
- Second, the detection and investigation of crime, including physical abuse of nursing home residents in our nation’s communities, falls primarily to State or local, not Federal authorities. State and local authorities receive and investigate most criminal complaints of neglect, abuse, or financial exploitation of the elderly.¹⁴⁸ State long-term care ombudsmen also play a supporting role in resolving the quality of care or other complaints of nursing home residents and their families, while State adult protective services agencies typically handle complaints of elder abuse occurring in private homes or other contexts.
- Third, regardless of whether a nursing home participates in the Medicare and Medicaid programs, it is subject to the oversight of the State health agency in the State where it is located. State agencies vary widely in their approach to oversight and their efforts to correct staffing and infection control deficiencies.
- Fourth, States take the lead role in conducting training programs on compliance with regulatory requirements for employees of nursing homes.¹⁴⁹

¹⁴⁷ Univ. of Rochester Medical Center, *supra* note 141.

¹⁴⁸ MaryBeth Musumeci, *Key Questions About Nursing Home Regulation and Oversight in the Wake of COVID-19*, KFF (Aug. 3, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-nursing-home-regulation-and-oversight-in-the-wake-of-covid-19/> (“Certification of nursing home compliance with federal Medicare and/or Medicaid requirements generally is performed by states through regular inspections known as surveys.”).

¹⁴⁹ *Id.*

At the Federal level, the Centers for Medicare and Medicaid Services (CMS) has a key role to play in nursing home oversight,¹⁵⁰ at least with respect to Medicare- and Medicaid-enrolled facilities. (Medicare and Medicaid are the primary payer for 14% and 62%, respectively, of all nursing home residents, while about a quarter of nursing home residents pay privately or rely on other sources, such as private insurance.)¹⁵¹ Congress also has authorized limited funding for discretionary grants and other activities, authorized by the Elder Justice Act and the Older Americans Act, to support the work of each State’s long-term care ombudsman.

In adopting the Nursing Home Reform Law, Congress in 1987 established a Federal certification process for Medicare- and Medicaid-enrolled nursing homes, which is in addition to each State’s standards or certification process for all nursing facilities within its jurisdiction. The Nursing Home Reform Law also requires that States do random inspections, known as surveys, to ensure compliance with the Federal statute’s requirements. But even certification of nursing home compliance with the requirements of Medicare and Medicaid ordinarily is carried out by States through these periodic “surveys,”¹⁵² and criminal activity would be investigated by each State’s Medicare Fraud Control Unit.

This issue came up at a July 23, 2019 hearing of the Finance Committee, convened by Chairman Grassley. Megan Tucker of the HHS Office of Inspector General (OIG) suggested that abuse in long-term care facilities is still underreported, and even when reported, the complaints may not be promptly investigated by State and local authorities. She recommended that CMS use emergency room diagnosis codes, collected from claims data, to confirm that abuse and neglect violations are being properly reported and corrected in Medicare- and Medicaid-enrolled nursing homes. John Dicken of the Government Accountability Office (GAO), in discussing a 2019 GAO report released at the hearing,¹⁵³ testified that nursing home abuse deficiencies more than doubled in a recent five-year period (with the highest increase in actual harm and immediate

¹⁵⁰ *Id.* (explaining that the “Social Security Act authorizes the Health and Human Services (HHS) Secretary to establish requirements relating to nursing home residents’ health, safety and well-being as conditions for facilities to receive payment from the Medicare and Medicaid programs”).

¹⁵¹ Phoenix Voorhies and Kirsten J. Colello, *supra* note 31. As noted by the Congressional Research Service: “Combined, Medicare and Medicaid (state and federal) spent \$88 billion on nursing homes services in 2018, which accounted for 52% of total U.S. nursing home spending.” *Id.* See also Charlene Harrington et al., *supra* note 13.

¹⁵² MaryBeth Musumeci, *supra* note 148 (also noting that States receive 75% federal matching funds for Medicaid nursing facility survey and certification activities, while Medicare skilled nursing facility survey and certification activities are funded by a discretionary appropriation).

¹⁵³ GAO, GAO-19-433, *Nursing Homes: Improved Oversight Needed to Prevent Abuse* (July 2019), <https://www.gao.gov/assets/700/699721.pdf>. See also HEHS-99-80, *Nursing Homes: Complaint Investigation Processes Often Inadequate to Protect Residents*, (Mar. 22, 1999), <https://www.gao.gov/products/HEHS-99-80>; GAO, *Nursing Homes: Many Shortcomings Exist in Efforts to Protect Residents from Abuse*, GAO-02-448 (Mar 4, 2002), <https://www.gao.gov/products/GAO-02-448T>; GAO, T-HEHS-99-89, *Nursing Homes: Stronger Complaint and Enforcement Practices Needed to Better Ensure Adequate Care* (Mar. 22, 1999), <https://www.gao.gov/products/T-HEHS-99-89>; GAO, GAO-02-312, *Nursing Homes: More Can Be Done to Protect Residents from Abuse* (Mar. 1, 2002), https://www.gao.gov/search?q=nursing+homes&page_name=main&tab=Solr&o=10; cf. GAO, Testimony, *Nursing*

jeopardy deficiencies). GAO, too, has suggested that abuse in nursing homes is still under-reported.

2. What steps did nursing facilities take during the earliest phase of the pandemic, and were these steps sufficient?

Once again, nursing homes varied in their approach to the earliest phase of the COVID-19 pandemic. As explained below, some nursing home administrators did not take steps necessary to curb the spread of the virus in their facilities.

- **Different Approaches to Infection Control & Prevention**

To at least some extent, infection control deficiencies have persisted in some nursing facilities even *during* the COVID-19 pandemic, media reports suggest.¹⁵⁴ We have seen scattered accounts of care workers having to purchase their own personal protective equipment, or reuse the same isolation gown throughout their shifts,¹⁵⁵ or rely on rain ponchos in lieu of isolation gowns in the early phases of this national emergency.¹⁵⁶ This excerpt from an article about a California nursing home is revealing, in what it discloses about facilities that struggled with infection control after the COVID-19 outbreak:

“John is one of the lucky ones. That is, if good fortune can be ascribed to someone living at a nursing home where 83 residents and 30 staff have contracted COVID-19 – and 19 have died from the disease....As he waited to be tested, John watched the facility create a ‘phony

Homes: Complaint Investigation Processes in Maryland (Jun. 15, 1999), <https://www.gao.gov/assets/110/107964.pdf> (in which GAO recommended strengthened standards for and oversight of state complaint practices after identifying “numerous problems, including procedures or practices that may limit the filing of, or understate the seriousness of, complaints and fail to ensure their prompt investigation).

¹⁵⁴ See, e.g., Betsy Z. Russell, “More than half of Idaho nursing home inspections find infection-control deficiencies amid pandemic” *Bozeman Daily Chronicle* (Aug. 21, 2020), https://www.bozemandailychronicle.com/nampa/news/local/more-than-half-of-idaho-nursing-home-inspections-find-infection-control-deficiencies-amid-pandemic/article_092a73be-51e8-5cab-b4ec-e5b61705e4b2.html.

¹⁵⁵ In one 1,700 bed facility in which 200 residents contracted COVID-19, an “aide said that staff members are only being given one disposable gown for their entire shift, even if it becomes soiled, and they must constantly circulate between residents who are infected and those who are not. ‘How do you expect to use the same gown? We are cleaning them, wiping their mouths, there’s stuff on us,’ the aide said. ‘I feel like I’m spreading the virus.’ While one area of the nursing home where she works had once been designated for infected residents, there are now so many who are sick that they are mixed in throughout the entire facility, the aide added.” See Suzy Kim and Laura Strickler, *supra* note 2.

¹⁵⁶ Blake Ellis and Melanie Hicken, *Nursing Home Workers Warned Government About Safety Violations Before COVID-19 Outbreaks and Deaths*, CNN (May 14, 2020) (describing nursing home employees’ complaints “of wearing rain ponchos”), available at <https://www.cnn.com/2020/05/14/us/nursing-home-workers-safety-coronavirus-invs/index.html>.

isolation ward’ for COVID-19 patients, blocked off only by a thin plastic drop cloth with tape. Sick residents were regularly moved past his door by certified nursing assistants who, he said, had to buy their own masks and other personal protective equipment in the first weeks of the outbreak.”¹⁵⁷

But in some of the nation’s facilities the reverse was true, with administrators making exceptional efforts to prevent the introduction of COVID-19 into their facilities. Two examples include:

- ***San Francisco Center for Jewish Living (California)***. Nursing homes account for almost half of coronavirus fatalities in California,¹⁵⁸ but at one San Francisco facility, none of the 300 residents had tested positive for the virus as of late May.¹⁵⁹ According to senior staff at this nine-acre senior housing complex facility: “Getting an early start was really the most helpful thing we did.”¹⁶⁰ The staff stocked up on personal protective equipment and masks for employees and residents.¹⁶¹ They screened all those who entered the complex for COVID-19 symptoms.¹⁶² They hired additional staff to clean bathrooms and common areas.¹⁶³ And they trained everyone on best practices for containing the virus (e.g., washing hands, avoiding close contact, and keeping an eye out for fevers, coughs, or other COVID-19 symptoms).¹⁶⁴
- ***Maryland Baptist Aged Home (Maryland)***. Nursing homes account for about 60% of the coronavirus fatalities in Maryland, but there was not one case in a 30-bed facility in Baltimore as of this summer.¹⁶⁵ The director had locked down the facility by early March,¹⁶⁶ anticipating that the virus, if introduced to the facility, would most likely enter from the outside. The facility immediately ended in-person visitation and adopted a

¹⁵⁷ Danny Feingold, *supra* note 4.

¹⁵⁸ Anita Chabria, Ben Welsh, et al, *supra* note 86.

¹⁵⁹ Sarah Harrison, *Some Nursing Homes Escaped COVID-19—Here’s What They Did Right*, WIRED (May 29, 2020), <https://www.wired.com/story/some-nursing-homes-escaped-covid-19-heres-what-they-did-right/>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Amna Nawaz, *supra* note 24.

¹⁶⁶ *Id.*

rigorous screening process for employees coming to work.¹⁶⁷ A full-time quality assurance infection control nurse, who had worked at the facility for years prior to the pandemic, instituted infection prevention measures, thereby ensuring that all personnel wore masks, a gown, and gloves when coming into contact with residents.¹⁶⁸

On April 2nd, CMS issued a call to action for nursing homes as well as State and local governments.¹⁶⁹ CMS included guidance highlighting their infection control responsibilities. It also called for State and local officials to work closely with nursing homes in their communities to assess these facilities’ need for COVID-19 testing and personal protective equipment. CMS also urged States and local governments to work with nursing homes to designate certain sites for COVID-19-positive or COVID-19 negative patients to avoid further transmission. In addition, on April 19th, two days after receiving a letter from Chairman Grassley inquiring about this issue, CMS announced that it would revisit infection prevention and control standards for nursing homes.¹⁷⁰

- **Screening of Staff and Visitors Varied During Pandemic**

Screening is not a perfect tool to prevent the introduction of COVID-19 into nursing homes, because the asymptomatic or pre-symptomatic can introduce the virus into a facility without knowing. Still, research underscores the importance of diligently screening all nursing home staff and essential visitors:

“Staff who had worked while symptomatic” and “staff who worked in more than one facility...” have fueled the spread of the COVID-19 in nursing homes, according to a study published in the *New England Journal of Medicine*.¹⁷¹ Another study, published by the CDC last March, noted that “staffers working in multiple facilities” contributed to the spread of the virus in a King County, Washington nursing home where 81 of the 130 residents contracted COVID-19.¹⁷²

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ CMS, Press Release: “Trump Administration Issues Key Recommendations to Nursing Homes, State and Local Governments (Apr. 2, 2020), <https://www.cms.gov/newsroom/press-releases/trump-administration-issues-key-recommendations-nursing-homes-state-and-local-governments>.”

¹⁷⁰ CMS, Press Release: “Trump Administration announces new nursing homes COVID-19 transparency effort” (Apr. 19, 2020), available at <https://www.cms.gov/newsroom/press-releases/trump-administration-announces-new-nursing-homes-covid-19-transparency-effort>.”

¹⁷¹ *Id.*

¹⁷² Temet M. McMichael, Shauna Clark, et al., *COVID-19 in a Long-Term Care Facility — King County, Washington, February 27–March 9, 2020* (published in CDC, MORBIDITY AND MORTALITY WEEKLY REPORT” (March 10, 2020)). See also Temet M. McMichael, Dustin W. Currie, et al., *supra* note 99; Charlene Harrington,

CMS issued guidance on March 13th that also confirms the importance of screening for visitors and staff during the national emergency.¹⁷³ Screening “might include taking a person's temperature and asking about recent respiratory symptoms like a cough and shortness of breath, before that person enters the facility.”¹⁷⁴

- **Differences Among Facilities in Adoption of Cohorting Strategies**

Cohorting, or the practice of grouping infected patients together, is recommended by public health experts to limit exposure of the uninfected to the coronavirus.¹⁷⁵ The CDC urged months ago that hospitals and nursing homes isolate those with COVID-19, ideally in a unit that is separate from other rooms or units housing the uninfected. But patient commingling apparently persists in some nursing homes across the nation.

For example, in May, when 52% of fatalities in New Jersey were linked to nursing homes,¹⁷⁶ *TIME* reported that a facility in New Jersey “allowed seemingly healthy residents to share rooms with residents who had symptoms of COVID-19.”¹⁷⁷ In June, Maryland health officials fined a nursing home (the site of one that State’s early COVID-19 outbreaks) \$70,000 for failing to isolate new residents or separate the sick from the uninfected.¹⁷⁸ In July, when the coronavirus already was present in all but 17 of the nation’s counties, a national survey of over 21,000 nurses

Leslie Ross, et al., *Nurse Staffing and Coronavirus Infections in California Nursing Homes*, *supra* note 15 at 1 (citing CDC report that “staff members who worked while symptomatic and in more than one facility” was one factor in the nursing home outbreak in King County, Washington).

¹⁷³ CMS, Press Release: “CMS Announces New Measures to Protect Nursing Home Residents from COVID-19 (Mar. 13, 2020),” available at <https://www.cms.gov/newsroom/press-releases/cms-announces-new-measures-protect-nursing-home-residents-covid-19>.

¹⁷⁴ HUB Staff Report, *supra* note 35.

¹⁷⁵ CDC, Webpage, “Responding to Coronavirus (COVID-19) in Nursing Homes” (updated Apr. 30, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/nursing-homes-responding.html>.

¹⁷⁶ Karen Yourish, K.K. Rebecca. Lai, et al., *One-Third of All U.S. Coronavirus Deaths are Nursing Home Residents or Workers*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html>

¹⁷⁷ “It’s Getting Worse.” *Nursing Home Workers Confront Risks in Facilities Devastated by Coronavirus*, TIME (May 29, 2020), <https://time.com/5843893/nursing-homes-workers-coronavirus/>

¹⁷⁸ Rachel Chason, “Maryland Imposes \$70,000 fine on nursing home where nearly all residents contracted covid-19,” THE WASHINGTON POST (Jun. 26, 2020), https://www.washingtonpost.com/local/maryland-imposes-70000-fine-on-nursing-home-where-nearly-all-residents-contracted-covid-19/2020/06/26/a0ece6ee-b7cb-11ea-a8da-693df3d7674a_story.html.

revealed that almost a third were employed by a health care facility without a dedicated COVID-19 unit.

A September 10th report by *Kaiser Health News* indicates that the issue of resident commingling may persist even today, as “dozens of nursing homes and hospitals ignored official guidelines to separate COVID patients from those without the coronavirus, in some cases fueling its spread and leaving staff unprepared and infected, or in some cases, dead.”¹⁷⁹ KHN found commingling of the infected with the uninfected in healthcare facilities in multiple States, “including California, Florida, New Jersey, Iowa, Ohio, Maryland and New York.”¹⁸⁰

- **Challenges for Some Facilities Relating to Personal Protective Equipment**

Research suggests that inadequate familiarity with and adherence to recommendations relating to personal protective equipment, or PPE, was a factor in some COVID-19 outbreaks in nursing homes.¹⁸¹ Shortages of PPE also posed a challenge for some facilities that had not stocked up on masks, gowns, face shields, and other forms of PPE prior to the pandemic. As noted in a study published by the *New England Journal of Medicine*:

“Examples of specific PPE challenges included an initial lack of available eye protection, frequent changes in PPE types because supply chains were disrupted and PPE was being obtained through various donations or suppliers, and a need for a designated staff member to observe PPE use to ensure that staff were consistent with safe PPE handling (e.g., not touching or adjusting face protection, primarily face masks, during extended use).¹⁸²

Media reports also suggest that some nursing homes did not prioritize the purchase of personal protective equipment earlier, because it was so rarely needed by these facilities before this year’s pandemic.¹⁸³ Nursing homes that scrambled to purchase it during the emergency

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See, e.g., Temet M. McMichael, Dustin W. Currie, et al., *supra* note 99 (“Information received from surveys of long-term care facilities and on-site visits identified factors that were likely to have contributed to the vulnerability of [some of] these facilities, including...inadequate familiarity with and adherence to PPE recommendations”). See also Seshadri Sandhya, Cahtleen Concannon, et al, *supra* note 127 at 1 (noting that some care workers in nursing homes ended up with ill fitting N95 masks during the emergency period, because care workers in most nursing homes “did not routinely use respirators such as N95 masks” before the pandemic, and as a result, their nursing homes were unable to rapidly fit test these workers for the masks during the pandemic).

¹⁸² See, e.g., Temet M. McMichael, Dustin W. Currie, et al., *supra* note 99.

¹⁸³ Maggie Flynn, *As Nursing Homes Compete Against Bigger Rivals for PPE, “It’s Like the Wild West,”* SKILLED NURSING NEWS (May 25, 2020), <https://skillednursingnews.com/2020/05/as-nursing-homes-compete-against-bigger-rivals-for-ppe-its-like-the-wild-west/>.

period faced price gouging and had to compete with hospitals for limited supplies of masks, gowns, and face shields,¹⁸⁴ according to an equipment supplier:

“You take an item like a three-ply mask, you talk about six months’ stock of a three-ply mask. An average facility could use about five boxes a month, a week to a month, depending on how much they use. They don’t really use those items very much unless — this is before COVID — the patient was in isolation. You don’t walk into a nursing home and see the nurses walking around with masks. They don’t walk around with gowns, either. They only do that when they’re going into a patient that is in isolation, or when they’re doing some type of a procedure.

So an average facility, before COVID, was buying five boxes of masks a week or a month, depending on how big the facility is — the average facility is 100 beds, so call it 10 boxes a month maximum. All of a sudden, they’re buying 50 boxes a month, because they’re using it every day and changing that five times a day. Same thing with gloves. So your six-month stock might have only lasted for two months.

And I want to give one example of something that’s very important. You take a box of masks that would cost you under \$1 a box, and all of a sudden they were costing \$15 to \$20 a box. In the beginning, it was even more.”¹⁸⁵

Meanwhile, studies underscore the strong benefits of using PPE, especially face masks, which block viral particles from entering the nose and mouth, in nursing homes during this pandemic.¹⁸⁶ One recent study published last week in the *New England Journal of Medicine* suggests that universal masking may reduce the amount of viral droplets that people inhale when exposed to the virus, which could in turn reduce the severity of COVID-19, should people

¹⁸⁴ R. Tamara Konetzka. U.S. Senate Testimony before the Senate Special Committee on Aging (May 21, 2020) (“Existing staff gaps are exacerbated by pandemic-related absences for illnesses or child care.”), https://www.aging.senate.gov/imo/media/doc/SCA_Konetzka_05_21_20.pdf.

¹⁸⁵ Maggie Flynn, *supra* note 183.

¹⁸⁶ By one account, masking reduces COVID-19 transmission by 30% or more. See The Institute for Health Metrics and Evaluation, Univ. of Washington (hereinafter “IHME”), Webpage (last visited Sept. 21, 2020), <https://covid19.healthdata.org/united-states-of-america?view=mask-use&tab=trend>. According to IHME, only six states reportedly have mask use of 50%, as of this report: Alaska, California, Florida, Hawaii, Texas, and Virginia. See IHME, Webpage, “United States; Model updates for September 11, 2020,” (last visited Sept. 21, 2020), http://www.healthdata.org/sites/default/files/files/Projects/COVID/briefing_US_091120.pdf.

become infected, and also ensure that a greater percentage of new cases are asymptomatic.¹⁸⁷

State and local health officials reportedly have worked collaboratively with CDC officials in recent weeks and months to provide “five focused PPE trainings for facility staff, including donning and doffing demonstrations and practice, and three additional basic infection control visits, including hand hygiene assessments, audits of PPE use, and reviews of environmental cleaning and disinfection practices.”¹⁸⁸

- **Differences in Nursing Home Staffing Levels During Pandemic**

As noted above, prior to this pandemic, many nursing homes faced challenges in recruiting and retaining highly qualified nursing staff.¹⁸⁹ Staffing shortages only increased as COVID-19 surged in nursing homes across the nation,¹⁹⁰ and the shortages seemed to have taken a toll on nursing homes during the pandemic.¹⁹¹ On May 19, 2020, *NBC News* also reported that COVID-19 exposed existing nursing home staffing shortages, and “turned these challenges into a full-blown crisis for these workers – the majority of whom are women and people of color – who [had] suddenly found themselves on the front lines of the pandemic, with limited protection and outside oversight.”¹⁹²

- **Differences in Transparency and Communication Styles**

Government audits have revealed that, while some nursing homes were conscientious in reporting infections this year, others did not promptly communicate with health or workplace safety authorities and residents’ family members about the escalating situation in their facilities. For example, when the Occupational Safety and Health Administration (OSHA) on May 18th

¹⁸⁷ Monica Gandhi and George W. Rutherford, “Facial Masking for Covid-19—Potential for ‘Variolation’ as We Await a Vaccine,” *NEW ENGLAND J. MEDICINE* (Sep. 8, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2026913?query=recirc_mostViewed_railB_article

¹⁸⁸ See, e.g., Temet M. McMichael, Dustin W. Currie, et al., *supra* note 99.

¹⁸⁹ See also David Hefner, *supra* note 46 (citing a study indicating that patients “in most nursing homes are not receiving proper care due to a shortage of workers”).

¹⁹⁰ Jennifer Abbasi, *supra* note 2.

¹⁹¹ Brian E. McGarry, David C. Grabowski, et al., *supra* note 36.

¹⁹² Suzy Khimm, “The Forgotten Front Line: Nursing Home Workers Say They Face Retaliation for Reporting COVID-19 Risks” *NBC NEWS* (May 19, 2020), <https://www.nbcnews.com/news/us-news/forgotten-front-line-nursing-home-workers-say-they-face-retaliation-n1209606>.

issued its first citation as a result of a coronavirus-related inspection,¹⁹³ it involved the facility’s failure to report, within the required 24 hours, the hospitalization of six of the facility’s employees. The Winder, Georgia facility allegedly waited two weeks, rather than 24 hours, to make this report to OSHA.

Similarly, the Kirkland, Washington facility that was the site of the nation’s first outbreak of COVID-19 in nursing homes faces potential fines of more than \$611,000, and risks the loss of its Medicare and Medicaid funding, due to reporting lapses (as well as other deficiencies) that reportedly led to the deaths of numerous residents.¹⁹⁴ In a recent letter to the facility, CMS indicated that “the nursing home failed to report an outbreak of respiratory illness to local authorities for two weeks as required by law, gave inadequate care to its residents during the outbreak and failed to provide 24-hour emergency doctor services.”¹⁹⁵

In April, reports also emerged that some nursing home administrators, seemingly overwhelmed by the surge of COVID-19 in their facilities, were not promptly or effectively communicating with residents’ family members about the escalating situation.¹⁹⁶ (The media even uncovered an instance in which a nursing home buried an 88 year-old resident before his family knew of his death.)¹⁹⁷

As noted by the CDC, however, there also were nursing home administrators who made exemplary efforts, through frequent communication, to build trust with residents and family members during the pandemic.¹⁹⁸ CDC’s webpage highlights one Massachusetts nursing facility that relied on automated voice messages (an aspect of its pre-pandemic emergency plan) and posted daily updates on its webpage and using social media:

¹⁹³ U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., “Citation and Notification of Penalty” Inspection No. 1474760 (May 18, 2020), available at <https://aboutblaw.com/Q9u>.

¹⁹⁴ Maria Sacchetti and John Swaine, *Wash. Nursing Home Faces \$611,000 Fine Over Lapses During Fatal Coronavirus Outbreak*, THE WASHINGTON POST (Apr. 2, 2020), https://www.washingtonpost.com/investigations/wash-nursing-home-faces-611000-fine-over-lapses-during-fatal-coronavirus-outbreak/2020/04/02/757cee76-7498-11ea-87da-77a8136c1a6d_story.html.

¹⁹⁵ *Id.*

¹⁹⁶ Bill Chappell, *More Than 100 Residents Have COVID-19 at N.J. Nursing Home Where 17 Bodies Were Found*, NPR (Apr. 16, 2020) (“Families who lost loved ones say they received form letters telling them their loved ones were sick—and in at least one case, the letter arrived after the patient died.”), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/836014004/families-say-they-received-form-letters-from-n-j-nursing-home-as-loved-ones-died>.

¹⁹⁷ *Man in N.J. nursing home was buried before his family even knew he was dead*, NJ.COM (Jun. 7, 2020) (describing how an elderly resident died from COVID-19 on April 13th, but neither the State of New Jersey nor the nursing home reached his family until after his burial), <https://www.nj.com/coronavirus/2020/06/stricken-in-a-nursing-home-with-covid-19-he-was-buried-before-his-family-even-knew-he-was-dead.html>.

¹⁹⁸ CDC, Webpage, “Infection Prevention Success Stories” (last visited Sep. 21, 2020), available at <https://www.cdc.gov/longtermcare/success-stories.html>.

“To communicate with families and residents, the team at Liberty Commons opted for automated voice messages, which had long been part of its emergency preparedness plan. The messages are also posted on the facility’s website every day and shared on social media. The website shows ongoing aggregate COVID-19 testing results for both residents and staff; information about PPE procurement and recoveries from COVID-19; and “human interest” updates, especially as they relate to visitor restrictions and isolation precautions. A key communication success has been the implementation of a dedicated ‘info’ email address and voicemail for families to leave questions, promising response within a business day....When two residents tested positive for COVID-19, the response remained positive about preparedness, operational response, and communication.”¹⁹⁹

- **Other Factors, Including Quality Ratings and Racial Disparities**

As of this report, it is difficult to draw definitive conclusions about additional factors that may have fueled the spread of the virus in nursing homes. For example, researchers currently disagree about the link between quality ratings and infection rates, or the link between nonprofit or for-profit status and infection rates. Researchers tend to agree that racial and economic disparities exist, and that racial disparities correlate with COVID-19 infection rates.

Quality Ratings: Some nursing homes have a history of more deficiencies, as reflected in quality ratings, than others. According to Kaiser Health Foundation, in regular surveys conducted from January 2019 through March 2020, nearly half of nursing facilities had an infection control deficiency.²⁰⁰ Most, or 80%, of the facilities had a deficiency related to resident quality of life or care, and 37% had been cited for an abuse, neglect, or exploitation deficiency.²⁰¹ Some researchers who have studied these issues suggest that there’s a link between low ratings or quality of care problems and the introduction of COVID-19 into a facility.²⁰² For instance:

- A survey of 1,000 California nursing homes found that the introduction of COVID-19 was more likely to occur in California facilities with the most quality of care problems prior to the pandemic. (In 73 of the State’s nursing homes with more than 10 COVID deaths, Medicare had rated about half of them “below average” or “much below

¹⁹⁹ *Id.*

²⁰⁰ MaryBeth Musumeci, *supra* note 147.

²⁰¹ *Id.*

²⁰² Ina Jaffe, *supra* note 111.

average.”²⁰³ About 30% of all nursing homes statewide had those lower ratings.)²⁰⁴

- According to another study, which focused on Connecticut data, “compared with one- to three-star facilities, four- or five-star facilities had 13% fewer confirmed cases, and facilities with high concentration of Medicaid residents or racial/ethnic minority residents had 16% and 15% more confirmed cases, respectively, than their counterparts.”²⁰⁵

But others have adopted a contrary view, saying that standard quality measures do not determine which nursing homes end up with more COVID-19 cases and fatalities. For example:

- At least one researcher maintains that there is no meaningful connection between Federal quality ratings and infections in nursing homes, and the presence of COVID-19 in the surrounding community is a much better predictor of a facility’s case rates.²⁰⁶
- Another researcher insists that there also is no meaningful differences in probability of COVID-19 cases by profit status, “with for profit nursing homes and not-for-profit nursing homes being equally likely to have cases (36%).²⁰⁷ This researcher also notes that there is “only a weak relationship with Medicaid” (with “nursing homes somewhat more likely to have cases if they were more dependent on Medicaid”).²⁰⁸

CMS, which regulates nursing homes, has embraced the view, based on preliminary data, that lower-rated facilities actually *are* more likely to have COVID-19 present. “Facilities with a one-star quality rating were more likely to have large numbers of COVID-19 cases than facilities

²⁰³ Xenia Shih Bion, “Why Nursing Homes Became COVID Hotspots,” CALIF. HEALTH FOUNDATION (July 13, 2020), (<https://www.chcf.org/blog/why-nursing-homes-become-covid-19-hot-spots/>) (citing research by Charlene Harrington at the University of California-San Francisco). The article also notes that inadequate PPE, inadequate rapid testing, and short staffing compounded infection control problems in California facilities. See also *Who’s Watching Now? COVID Cases Swell in Nursing Homes with Poor Track Records*, CALMATTERS (updated Jul. 23, 2020), <https://calmatters.org/health/coronavirus/2020/06/nursing-homes-coronavirus-deaths-infections-inspections-violations-kingston-california/>.

²⁰⁴ *Id.*

²⁰⁵ Yue Li, Helena Temkin-Greener, et al, *COVID-19 Infections and Deaths among Connecticut Nursing Home Residents: Facility Correlates*, J. AMER. GERIATRICS SOC’Y, (Jun. 18, 2020), <https://doi.org/10.1111/jgs.16689>.

²⁰⁶ Alex Spanko, *No Connection Between Nursing Home Ratings, Profit Status and COVID-19 — But Race a Major Factor*, SKILLED NURSING NEWS (May 21, 2020), <https://skillednursingnews.com/2020/05/no-connection-between-nursing-home-ratings-profit-status-and-covid-19-but-race-a-major-factor/>.

²⁰⁷ R. Tamara Konetzka, *supra* note 184; Ina Jaffe, *supra* note 111.

²⁰⁸ *Id.*

with a five-star quality rating.” CMS noted on June 1st.²⁰⁹ CMS also announced that it will take enforcement action against the nursing homes that have persistent infection control violations or that have not reported data into the CDC as required under CMS participation requirements.²¹⁰

Recent audits of nursing homes by OSHA also point to violations that could have contributed to COVID-19 transmission in selected nursing homes. For example, OSHA cited a Salem, Ohio, facility on July 13th for serious violations of Federal requirements, including the failure to establish and implement “a written respiratory protection program,”²¹¹ with provisions for cleaning and disinfection of respirators and ensuring employees’ training in the proper use of respirators.²¹²

Racial Disparities: Another issue, on which most experts seem to agree, is that racial disparities exist in nursing homes, and such disparities seem to correlate with differences in the impact of COVID-19 on residents and personnel. Nursing homes “with a significant number of black and Latino residents have been twice as likely to be hit by the coronavirus as those where the population is overwhelmingly white.”²¹³

Similarly, a University of Chicago study concluded that “nursing homes serving mostly minority populations are twice as likely to experience a deadly coronavirus outbreak as those

²⁰⁹ CMS, Press Release: “Trump Administration Unveils Enhanced Enforcement Actions Based on Nursing Home COVID-19 Data and Inspection Results” (Jun. 1, 2020), available at <https://www.cms.gov/newsroom/press-releases/trump-administration-unveils-enhanced-enforcement-actions-based-nursing-home-covid-19-data-and> .

²¹⁰ *Id.*

²¹¹ OSHA, Press Release (Region 5): “U.S. Department of Labor Cites Ohio Nursing Facilities for Failing to Fully Implement Respiratory Programs to Protect Employees from Coronavirus” (July 21, 2020), <https://www.osha.gov/news/newsreleases/region5/07212020>.

²¹² *Id.* at 2 (“In addition, where the citation indicates that abatement documentation is necessary, evidence of the purchase or repair of equipment, photographs or video, receipts, training records, etc., verifying that abatement has occurred is required to be provided to the Area Director.”).

²¹³ Robert Gebeloff, et al., *The Striking Racial Divide in How Covid-19 Has Hit Nursing Homes*, N.Y. TIMES (Sep. 10, 2020), <https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html> (“Covid-19 has been particularly virulent toward African-Americans and Latinos: Nursing homes where those groups make up a significant portion of the residents — no matter their location, no matter their size, no matter their government rating — have been twice as likely to get hit by the coronavirus as those where the population is overwhelmingly white.”).

with mostly white residents.”²¹⁴ In addition, according to data published by CMS, more than 60% of nursing homes where at least a quarter of the residents are Black or Latino have reported at least one coronavirus case . . . [which] is double the rate of homes where Black and Latino people make up less than 5% of the population.”²¹⁵

D. DIFFERENCES IN STATE GOVERNMENTS’ RESPONSE TO COVID-19

Governors varied widely in their response to the COVID-19 pandemic in nursing homes. As noted in one article: “Who is state governor has been one of the most important factors in how each state has responded to the pandemic: moving quickly to shutdowns and stay-at-home orders, or not moving at all: with high stakes consequences.”²¹⁶

1. Some Governors Pressed Nursing Homes to Accept the Infected During the Pandemic

As reported by the media, the governors of a handful of States in which some nursing homes struggled to provide safe and adequate care “actually ordered nursing homes to accept patients with active COVID-19 infections who were being discharged from hospitals.”²¹⁷ Governors issuing such directives include those in New York, New Jersey, Pennsylvania,

²¹⁴ Allison Pecorin and Matthew Mosk, *In Nursing Homes, as in Wider Community, Minorities Hit Hardest by COVID, Researchers Say*, ABC NEWS (May 21, 2020), <https://abcnews.go.com/Health/nursing-homes-wider-community-minorities-hit-hardest-covid/story?id=70789774>. See also THE CENTURY FOUNDATION, *Even in Nursing Homes, COVID-19 Racial Disparities Persist* (July 17, 2020) (“Data shows that the racial and ethnic health disparities that persist in the nation’s health care system are making the pandemic especially lethal for communities of color.”), <https://tcf.org/content/commentary/even-nursing-homes-covid-19-racial-disparities-persist/?session=1>; R. Tamara Konetzka. Senate Testimony, *supra* note 184; Jill Schumann, LEADING AGE, “Health Disparities Highlighted by COVID-19 Data” (Jun. 24, 2020), <https://leadingage.org/regulation/health-disparities-highlighted-covid-19-data>.

²¹⁵ Robert Gebeloff et al., *supra* note 210.

²¹⁶ *US governors and coronavirus: who has responded best and worst?* THE GUARDIAN (Apr. 17, 2020), <https://www.theguardian.com/us-news/2020/apr/17/us-governors-coronavirus-best-worst-andrew-cuomo>.

²¹⁷ Avrik Roy, *supra* note 108.

Michigan, California, and Minnesota.²¹⁸ These State directives were issued as COVID-19 case and fatality rates in nursing homes soared across the United States.

Five of these six States issued these directives in late March and early April, even though studies have documented the risks posed by the asymptomatic and presymptomatic COVID-19 carrier.²¹⁹ Shortly thereafter, *NPR* reported that “some of the largest states are now ordering nursing homes to accept patients who have been discharged from the hospital but are still recovering from COVID-19.”²²⁰

Criticism of these governors has mounted as nursing home fatalities surged in their jurisdictions. The WHO Regional Director for Europe also has taken the stance that the use of nursing homes as convalescent facilities for COVID-19 patients discharged from hospitals is a “costly mistake:”

“This was a terrible error in Northern Italy and Lombardy ... many of these people were not completely healed, they were still infected with COVID and that accounted for the spreading of the disease in a very frail population,” he said, adding that it’s “mandatory to avoid such a strategy.”²²¹

Yet some governors still have not retracted their directives, specifying instead that nursing

²¹⁸ Clara Hendrickson, *Michigan Is Not the Only State Allowing Nursing Homes to Accept COVID-19 Positive Residents*, DETROIT FREE PRESS (Aug. 28, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/08/28/michigan-not-alone-allowing-nursing-homes-take-covid-19-patients/5647263002/>; see also Kim Barker and Amy Julia Harris, “Playing Russian Roulette”: Nursing Homes Told to Take the Infected, N.Y. TIMES (Apr. 24, 2020) (citing “state guideline [that] says nursing homes cannot refuse to take patients from hospitals solely because they have the coronavirus”), available at <https://www.nytimes.com/2020/04/24/us/nursing-homescoronavirus.html>.

²¹⁹ See, e.g., CDC, Webpage (citing N.W. Furukawa, J.T. Brooks, et al., *Evidence supporting transmission of severe acute respiratory syndrome coronavirus 2 while presymptomatic or asymptomatic*, EMERG. INFEC. DIS. (May 4, 2020). <https://doi.org/10.3201/eid2607.201595>) (last visited Sep. 19, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e1.htm>.

²²⁰ Ina Jaffe, *supra* note 111.

²²¹ Barbara Kollmeyer, *supra* note 107 (citing the WHO Regional Director for Europe, who urged the isolation of the infected “via separate wards or spaces,” noting that “[Italy] also learned that using nursing homes as convalescent facilities for people discharged from hospitals and recuperating from the virus was a costly mistake.”)

homes must accept previously infected residents “under certain conditions” such as available bed capacity.²²²

Consider the executive orders, advisories, and directives issued by the following States:

New York. Governor Cuomo issued the following advisory on March 25th: “No resident shall be denied re-admission or admission to the NH [Nursing Home] solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.”²²³

This governor defended the advisory as needed to prevent hospital overcrowding. But as noted by *Forbes*, well after hospitalization rates already had peaked in New York,²²⁴ Governor Cuomo restated his position on April 23rd, declaring “that nursing homes ‘don’t have a right to object’ to accepting elderly patients with active COVID-19 infections.”²²⁵

Curiously, New York’s governor adopted this policy even though the U.S. Navy sent an entire hospital ship staffed with a crew of 1,200 to treat COVID-19 patients to New York in early April. Even more puzzling, State officials did not rely on this resource in any truly meaningful way:²²⁶ the 1,000 bed ship departed New York on April 30th, reportedly having treated fewer than 200 during its month-long stay.²²⁷ In addition, the

²²² Clara Hendrickson, *supra* note 218 (noting that neither Minnesota nor Michigan have reversed their State’s dangerous nursing home policy). “Michigan is not the only state in the U.S. that allows COVID-19-infected residents admission or readmission into nursing homes. A handful of states — including California, Minnesota, New Jersey and Pennsylvania — currently allow nursing homes to admit residents infected with COVID-19 under certain conditions. *Id.* See also *Editorial: Whitmer’s Veto Continues Bad Nursing Home Policy*, THE DETROIT NEWS (Aug. 5, 2020), https://www.detroitnews.com/story/opinion/editorials/2020/08/06/editorial-whitmers-veto-continues-bad-nursing-home-policy/3300487001/?_ga=2.224072094.401165484.1598638290-616507770.1598638287.

²²³ NEW YORK STATE DEP’T OF HEALTH, *Advisory: Hospital Discharges and Admissions to Nursing Homes* (Mar. 25, 2020), http://web.archive.org/web/20200407103413/https://coronavirus.health.ny.gov/system/files/documents/2020/03/doh_covid19-nhadmissionsreadmissions_-032520.pdf.

²²⁴ Avrik Roy, *supra* note 108.

²²⁵ *Id.*

²²⁶ J.D. Simkins, “Hospital ship Comfort departs NYC, having treated fewer than 200 patients, U.S. NAVY TIMES (Apr. 30, 2020) (“By the time of Comfort’s departure, the approximately 1,200-person crew and 1,000-bed hospital had treated just 182 patients, of which approximately 70 percent had COVID-19”), available at <https://www.navytimes.com/news/your-navy/2020/04/30/hospital-ship-comfort-departs-nyc-having-treated-fewerthan-200-patients/>.

²²⁷ *Id.* See also CNN, *Navy hospital ship deployed to NYC with 1,000 bed capacity is only treating 20 patients*, KDRV (Apr. 3, 2020), <https://www.kdrv.com/content/news/569349932.html>.

U.S. Army Corps of Engineers set up a temporary hospital inside the nation’s biggest convention center, the Jacob K. Javits Center, at the end of March, which by early April had the capacity to treat up to 2,500 patients.²²⁸

Meanwhile, New York currently has the highest number of COVID-19 deaths in the United States— 32,634 in all—with many of them among the elderly population, according to the CDC.²²⁹ Additionally, New York’s COVID-19 death rate by population is currently the second highest in the country with 1,680 deaths per million people.

New Jersey. Governor Murphy, acting through the State’s health commissioner, issued the following directive on March 31st: “No patient/resident shall be denied re-admission or admission to the post-acute care setting solely based on a confirmed diagnosis of COVID-19. Persons under investigation for COVID-19 who have undergone testing in the hospital shall not be discharged until results are available. Post-acute care facilities are prohibited from requiring a hospitalized patient/resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.”²³⁰

On August 24th, the U.S. Department of Justice reported that “New Jersey’s death rate by population is 1,733 deaths per million people – the highest in the nation.”²³¹ Adjusted for population, New Jersey ranks second in its nursing home fatality rate, as of mid-September, according to CMS data.²³²

Pennsylvania. Governor Wolf, acting through the Pennsylvania’s health department, on March 18th issued the following guidance for nursing facilities: “Nursing care facilities must continue to accept new admissions and receive readmissions for current residents

²²⁸ J.D. Simkins, *supra* note 225 (noting that “[u]nderutilization of resources in New York City is not unique to the Comfort. Thousands of hospital beds made available in a converted convention center have gone largely unused after quick assembly by the U.S. Army Corps of Engineers”).

²²⁹ CDC, Webpage, “United States COVID-19 Cases and Deaths by State” (last visited Sept. 21, 2020), <https://covid.cdc.gov/covid-data-tracker/#cases>.

²³⁰ STATE OF NEW JERSEY DEP’T OF HEALTH, *Hospital Discharges and Admissions to Post-Acute Care Settings* (Mar. 31, 2020), https://www.nj.gov/health/healthfacilities/documents/CN/temp_waivers/HospitalDischarges_andAdmissions_toPost-AcuteCareSettings.pdf.

²³¹ Press Release, U.S. DEPT. OF JUSTICE, “Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents” (Aug. 26, 2020), <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>.

²³² CMS, Webpage, “COVID-19 Nursing Home Data,” (last visited Sept. 21, 2020), *available at* <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>.

who have been discharged from the hospital who are stable to alleviate the increasing burden in the acute care settings. This may include stable patients who have had the COVID-19 virus.”²³³

As of mid-April, Pennsylvania had the seventh highest death rate for residents of nursing homes.²³⁴ According to one article: “As of early June, more than 4,200 residents of Pennsylvania’s long-term-care facilities have died from the coronavirus, nearly 70% of all the deaths attributed to the disease in the state.”²³⁵ As of the date of this report, Pennsylvania still has the seventh highest death rate for nursing home residents, adjusted for population, according to CMS data.²³⁶

Michigan: Governor Whitmer on April 15th issued the following order: “A long-term care facility must not prohibit admission or readmission of a resident based on COVID-19 testing requirements or results in a manner that is inconsistent with relevant guidance issued by the Department of Health and Human Services (“DHHS”).²³⁷ The governor later vetoed a bipartisan bill, adopted by the Michigan State legislature, which barred nursing homes from retaining COVID-19 patients or admitting the infected upon their release from a hospital.²³⁸ The bill that the governor vetoed would have ensured that the infected are placed “in a dedicated facility where they could receive proper care without placing other residents at risk.”²³⁹

²³³ PENNSYLVANIA DEP’T OF HEALTH, *Interim Guidance for Nursing Facilities During COVID-19* (Mar. 18, 2020), <https://pahomecare.memberclicks.net/assets/docs/FINAL%20FOR%20DISTRO%20Interim%20Nursing%20Facility%20Guidance%2003192020%20at%201500.pdf>.

²³⁴ Priya Chidambaram, *State Reports of Long-Term Care Facility Cases and Deaths Related to COVID-19*, KFF (Apr. 23, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-reporting-of-cases-and-deaths-due-to-covid-19-in-long-term-care-facilities/>.

²³⁵ Rebecca Moss, *supra* note 15.

²³⁶ *Id.* See also CMS, Webpage, “COVID-19 Nursing Home Data” (last visited Sept. 21, 2020), <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>.

²³⁷ State of Michigan, Office of the Governor, Exec. Order No. 2020-50, *Enhanced Protections for Residents and Staff of Long-term Care Facilities During the COVID-19 Pandemic* (Apr. 15, 2020), <http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-50.pdf>.

²³⁸ See Editorial: *Whitmer’s Veto Continues Bad Nursing Home Policy*, THE DETROIT NEWS (Aug. 5, 2020), <https://www.detroitnews.com/story/opinion/editorials/2020/08/06/editorial-whitmers-veto-continues-bad-nursing-home-policy/3300487001/>.

²³⁹ *Id.* See also Craig Mauger, *New Michigan numbers: 34% of COVID-19 deaths linked to nursing homes*, THE DETROIT NEWS (Jun. 15, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/06/15/new-michigan-numbers-34-covid-19-deaths-linked-nursing-homes/3193407001/>.

California. On March 30th, Governor Newsom, through the California Department of Public Health, issued guidance stating that skilled nursing facilities shall not use COVID-19 status as the basis for denying admission (or readmission) of residents, “nor transfer or discharge residents based on their status as a suspected or confirmed COVID-19 case.”²⁴⁰ This policy was then extended on June 26, 2020.²⁴¹ (Note that this policy was issued even though the President sent a 1,000-bed U.S. Navy hospital ship, staffed with more than 800 medical personnel, to Los Angeles, “with the intention of helping to alleviate the strain on the city’s hospital system due to the influx of patients infected by the novel coronavirus.”)²⁴²

Minnesota. On May 7th, Governor Walz, acting through the Minnesota Department of Health (MDH), issued guidance indicating that a COVID-19 positive test result should not be used to prevent a patient from being discharged from a hospital to a “congregate living setting.”²⁴³ Then, on July 30th, MDH updated its guidance to provide the following:

“MDH recommends that patients with suspected or confirmed COVID-19 be discharged when clinically indicated. Neither discontinuation of Transmission-based Precautions nor negative COVID-19 test results is required prior to hospital discharge[,] [and] [t]his guidance addresses hospital inpatients’ or congregate living settings residents’ discharge to home or to congregate living settings, and discontinuation of Transmission-based Precautions in hospitals and congregate living settings. Congregate living settings include assisted living and skilled nursing facilities, or other congregate living settings that provide direct care.”²⁴⁴

On March 13th, *before* the issuance of these governors’ advisories, directives, or orders relating to the admission of possibly infected patients to nursing homes, CMS issued the following guidance:

²⁴⁰ CALIFORNIA DEP’T OF HEALTH, *Suspension of Regulatory Enforcement of Specified Skilled Nursing Facility Requirements* (Mar. 30, 2020), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-20-32.aspx>.

²⁴¹ *Id.* at 1.

²⁴² *US Navy hospital ship departs for Los Angeles amid coronavirus pandemic*, MYCENTRALOREGON.COM (Mar. 23, 2020), <https://www.mycentraloregon.com/2020/03/23/us-navy-hospital-ship-departs-for-los-angeles-amid-coronavirus-pandemic/>.

²⁴³ MINNESOTA DEP’T OF HEALTH, *Interim Guidance for Discharge to Home or New/Re-Admission to Congregate Living Settings and Discontinuing Transmission-Based Precautions* (July 30, 2020), <https://www.health.state.mn.us/diseases/coronavirus/hcp/hospdischarge.pdf>.

²⁴⁴ *Id.* at 1.

“A nursing home can accept a resident diagnosed with COVID-19 and still under Transmission Based Precautions for COVID-19 as long as the facility can follow CDC guidance for Transmission-Based Precautions. If a nursing home cannot, *it must wait* until these precautions are discontinued.”²⁴⁵

Some skilled nursing facilities already may have an incentive, in the form of payments under State or Federal programs, for accepting patients discharged from hospitals with a COVID-19 diagnosis.²⁴⁶ Coronavirus-positive patients can bring in double or more the funding of other residents, according to reform advocates. As noted by the *Los Angeles Times* on May 3:

“A new Medicare reimbursement system that went into effect last fall pays nursing homes substantially more for new patients — including those released from a hospital — particularly for the first few weeks. Under those guidelines, COVID-19 patients can bring in upward of \$800 per day, according to nursing home administrators and medical directors interviewed by *The Times*. By contrast, facilities collect as little as \$200 per day for long-term patients with dementia, the industry experts said.”²⁴⁷

“As noted by *Politico*, “the ones most desperate for the money are often among those with low ratings and a history of citations for poor cleanliness or neglecting patients.”²⁴⁸ In Michigan, for example, eight of 20 nursing homes selected by the State government to build wings for coronavirus-positive patients are currently rated as “below average” or “much below average,” the two lowest designations, on the Health and Human Services department’s five-star nursing home rating scale.”²⁴⁹

²⁴⁵ CMS, QSO-20-14-NH, GUIDANCE FOR INFECTION CONTROL AND PREVENTION OF CORONAVIRUS DISEASE 2019 (COVID-19) IN NURSING HOMES (REVISED) (Mar. 13, 2020), <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>.

²⁴⁶ “Coronavirus-positive patients can bring in double or more the funding of other residents. States including California, Massachusetts, Michigan and New Mexico, wanting to relieve pressure on crowded hospitals, are providing extra incentives for nursing homes to accept such patients...But the ones most desperate for the money are often among those with low ratings and a history of citations for poor cleanliness or neglecting patients. In Michigan, for example, eight of 20 nursing homes selected by the state government to build wings for coronavirus positive patients are currently rated as “below average” or “much below average,” the two lowest designations, on the Health and Human Services department’s five-star nursing home rating scale.” Maggie Severns and Rachel Rouben, *States Prod Nursing Homes to Take More COVID-19 Patients*, POLITICO (Jun. 4, 2020), <https://www.politico.com/news/2020/06/04/states-nursing-homes-coronavirus-302134>.

²⁴⁷ Jack Dolan and Brittany Mejia, *Coronavirus Patients Could Be Cash Cows For Nursing Homes*, LOS ANGELES TIMES (May 3, 2020), <https://www.latimes.com/california/story/2020-05-03/coronavirus-nursing-homes-financial-profits>.

²⁴⁸ *Id.* (“A new Medicare reimbursement system that went into effect last fall pays nursing homes substantially more for new patients — including those released from a hospital — particularly for the first few weeks. Under those guidelines, COVID-19 patients can bring in upward of \$800 per day, according to nursing home administrators and medical directors interviewed by *The Times*. By contrast, facilities collect as little as \$200 per day for long-term patients with dementia, the industry experts said.”).

²⁴⁹ Maggie Severns and Rachel Rouben, *supra* note 246.

In light of this incentive, public officials should have expressly, and consistently, encouraged nursing home facilities uncomfortable with their directive to make alternative arrangements for those infected with the virus. At the Federal level, the Centers for Medicare and Medicaid Services (CMS) certainly did so: Administrator Seema Verma warned on May 27th that “[u]nder no circumstances should a hospital discharge a patient to a nursing home that is not prepared to take care of those patients’ needs.”²⁵⁰

In addition, CDC policy is that hospitals should discharge patients with a COVID-19 diagnosis only to nursing homes and other long-term care facilities that are capable of implementing all recommended infection control procedures. As noted by *Politifact*:

CDC “cited two ‘key factors’ to consider when deciding whether to discharge a patient with COVID-19 to a long-term care facility...First, is the patient medically ready for discharge to a long-term care facility? And second, *is the selected long-term care facility able to safely care for a patient recovering from the virus by implementing all recommended infection control procedures?* These [CDC] directives were in place on or before March 23, two days before the state [of New York] issued its advisory.”²⁵¹

State officials in other parts of the country followed this CDC guidance, often with better results. For example, Texas and Florida reportedly have lower COVID-19 death rates generally than New York, even though these States’ population is larger than New York’s, according to the Department of Justice:

“Texas’s death rate by population is 380 deaths per million people; and Texas has just over 11,000 deaths, though its population is 50% larger than New York and has many more recorded cases of COVID-19 – 577,537 cases in Texas versus 430,885 cases in

²⁵⁰ Danielle Brown, *Verma Calls out Cuomo for forcing NY nursing homes to take COVID-19 patients*, MCKNIGHT’S LONG-TERM CARE NEWS (May 29, 2020), <https://www.mcknights.com/news/verma-calls-out-cuomo-for-forcing-ny-nursing-homes-totake-covid-19-patients/>. A March 13th CMS document “says that nursing homes should only accept those patients for which they can care. The CMS memo also states: ‘Per CDC, prompt detection, triage and isolation of potentially infectious residents are essential to prevent unnecessary exposures among residents, healthcare personnel, and visitors at the facility. Therefore, facilities should continue to be vigilant in identifying any possible infected individuals.’” See also Letter from U.S. Representative Steve Scalise, (in his capacity as Ranking Member, House Select Subcomm. on the Coronavirus Crisis) to New York Attorney General Letita James (June 25, 2020), <https://republicans-oversight.house.gov/wp-content/uploads/2020/06/FINAL-Letter-to-NY-Attorney-General-6.25.20.pdf>.

²⁵¹ Jill Terrerri Ramos, *New York’s nursing home policy was not fully in line with CDC*, POLITIFACT (Jun. 13, 2020), <https://www.politifact.com/factchecks/2020/jun/13/andrew-cuomo/new-yorks-nursing-homepolicy-was-not-line-cdc/> (characterizing as “mostly false” a statement by New York Gov. Cuomo regarding CDC’s policy) [Emphasis added].

New York. Similarly, Florida’s COVID-19 death rate is 480 deaths per million; with total deaths of 10,325 and a population slightly larger than New York.”²⁵²

In Florida, the governor signed an order banning hospitals from discharging infected patients into long-term care facilities.²⁵³ Still other States designated some facilities for COVID-19 treatment only—an approach that some have characterized as a safer way to free up hospital beds for the most severely ill.²⁵⁴

It is possible that governors who pressured nursing home administrators to admit untested and contagious COVID-19 patients from hospitals may have fueled the spread of the coronavirus in nursing facilities throughout these jurisdictions.²⁵⁵ The risks of this practice certainly were evident at the outset of the pandemic, when the coronavirus spread rapidly in a Washington long-term care facility in March.²⁵⁶

As reported by *Forbes*, on March 17, as the pandemic was just beginning to accelerate, at least one epidemiologist warned “that ‘even some so-called mild or common-cold-type coronaviruses have been known for decades [to] have case fatality rates as high as 8% when they infect people in nursing homes.’”²⁵⁷ Deaths among residents of nursing homes and assisted-living facilities continue to increase.

²⁵² U.S. DEP’T OF JUSTICE, Press Release: “Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents,” (Aug. 26, 2020), <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>.

²⁵³ Don Shaw, *69% of COVID-19 Deaths in PA are Nursing or Personal Care Homes, House Speaker Unveils Bill to Protect Residents Living in Care*, PENNSYLVANIA CHRONICLE (June 19, 2020), available at <https://www.pennsylvaniachronicle.com/news-pennsylvania/pennsylvania/69-of-covid-19-deaths-in-pa-are-innursing-or-personal-care-homes-house-speaker-unveils-bill-to-protect-residents-living-in-care/>.

²⁵⁴ Danielle Brown, *Verma Calls out Cuomo for forcing NY nursing homes to take COVID-19 patients*, MCKNIGHT’S LONG-TERM CARE NEWS (May 29, 2020) (citing FOX NEWS interview with CMS Administrator Seema Verma), <https://www.mcknights.com/news/verma-calls-out-cuomo-for-forcing-ny-nursing-homes-totake-covid-19-patients/>.

²⁵⁵ Jill Terreri Ramos, *supra* note 251. As noted by POLITIFACT: “the AMDA Society for Post-Acute and Long-Term Care Medicine issued a statement on March 26 opposing the New York Governor’s] order: “We find the New York State Advisory to be over-reaching, not consistent with science, unenforceable, and beyond all, not in the least consistent with patient safety principles.” A joint statement by that organization and others in long-term care three days later reinforced their objections: “a blanket order for every nursing home in the state to accept all admissions from hospitals is not sound policy.”” *Id.*

²⁵⁶ Asia Fields and Paige Cornwell, *Coronavirus killed hundreds at Washington state’s long-term care facilities*, THE SEATTLE TIMES (Apr. 18, 2020), <https://www.seattletimes.com/seattle-news/coronavirus-killedhundreds-at-washington-states-long-term-care-facilities-six-weeks-later-widespread-testing-may-finally-near/>.

²⁵⁷ Avrik Roy, *supra* note 108.

The U.S. Department of Justice last month requested COVID-19 data from the governors of four states that issued orders which may have resulted in the deaths of thousands of elderly nursing home residents: New York, New Jersey, Pennsylvania, and Michigan.²⁵⁸ Its Civil Rights Division reportedly is evaluating whether to initiate investigations into these governors’ practices, under the Civil Rights of Institutionalized Persons Act, (CRIPA), a Federal statute that protects the civil rights of persons in state-run nursing homes, among others.²⁵⁹

2. Some State Officials Were Slower to Respond in Early Phase of Pandemic

In States where the governor intervened early and assertively, the effects on the nursing home population seemed to be less brutal than in others. (To illustrate: the actions of Ohio’s governor, who closed schools, bars, and restaurants in March and dispatched the National Guard to perform nursing home testing, earned praise from both sides of the aisle.²⁶⁰ Ohio ranks seventh among the States in population density, but its COVID-19 case rate in nursing homes, adjusted for population, is far lower than that of many other States.)²⁶¹

Adjusted for population, States with the highest case rate in nursing homes, as of mid-September, are New Jersey, Connecticut, Massachusetts, Louisiana, Mississippi, Alabama, Georgia, South Carolina, Arizona, Rhode Island, Texas, California, Maryland, Florida, Nevada, Pennsylvania, Delaware, and Illinois, in that order (according to CMS data).²⁶² The ten with the highest nursing home fatality rate, adjusted for population, are Massachusetts, New Jersey, Connecticut, Louisiana, Rhode Island, Mississippi, Pennsylvania, Maryland, Delaware, and Arizona.²⁶³

²⁵⁸ See U.S. DEPT. OF JUSTICE, *supra* note 252.

²⁵⁹ *Id.*

²⁶⁰ See, e.g., *Coronavirus: The US governor who saw it coming early*, BBC NEWS (Apr. 1, 2020), <https://www.bbc.com/news/world-us-canada-52113186>; see also Kathryn Ghion, *Sen. Brown praises Governor DeWine for COVID-19 response*, WTRF (May 29, 2020) (“The National Guard is testing nursing homes and Senator Brown says the Governor acted as quickly as he could to get that portion of the population tested.”), <https://www.wtrf.com/news/health/coronavirus/sen-brown-praises-governor-dewine-for-covid-19-response/>.

²⁶¹ CMS, Webpage, “COVID-19 Nursing Home Data” (last visited Sep. 19, 2020), available at <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/>.

²⁶² *Id.* Note that the States with the highest case and fatality rates in nursing homes are not necessarily the most densely populated States. The most densely populated are, in this order: California, Texas, Florida, New York, Pennsylvania, Illinois, Ohio, Georgia, North Carolina, Michigan, New Jersey, Virginia, Washington, Arizona, Massachusetts, Tennessee, Indiana, Missouri, Maryland, Wisconsin. See WORLD POPULATION REVIEW, Webpage (last visited Sept. 21, 2020), <https://worldpopulationreview.com/states>.

²⁶³ *Id.*

In some hard-hit States—especially those where public officials were slow to respond or lacked an effective infection control program—the consequences have been severe. Public officials who faced criticism for their handling of the COVID-19 outbreak in nursing homes include:

- **California.** Critics have suggested that California officials should have intervened more assertively to curb the impact of COVID-19 on nursing homes: “As the disease continues to spread in skilled nursing facilities, patient advocates and public officials are asking why the L.A. County Department of Public Health (LAC DPH) did not intervene earlier and more aggressively. The answer appears inextricably linked to the agency’s long track record of neglect in regulating nursing homes, and mismanagement of the immediate crisis by the department and its leader....”²⁶⁴
- **Illinois.** Another example of a possibly inadequate response by public officials is Illinois. According to a media report: “As COVID-19 was ravaging nursing home populations, which saw over half of the state’s pandemic deaths, the Illinois Department of Public Health chose for 3 1/2 months not to investigate 272 complaints of abuse and neglect. IDPH failed to investigate complaints between March 15 and June 30 despite laws requiring it to do so, the department admitted in a press release issued Aug. 21. The acknowledgement comes a month after IDPH fired Debra Bryars, an agency deputy director who ran the Office of Health Care Regulation. The agency had also placed Aimee Isham, who oversaw the Bureau of Long-Term Care, on indefinite paid leave.”²⁶⁵
- **Oregon.** The Oregon governor faced criticism for her months-long delay in adopting a plan for regularly testing nursing home personnel, after COVID-19 cases already had emerged in Oregon and nearby Washington State, where a “Seattle nursing home became the first epicenter of the pandemic in the United States.”²⁶⁶ As of late August, however, Oregon health department surveyors still were not being tested for the virus²⁶⁷ before

²⁶⁴ Danny Feingold, *L.A. Nursing Home Covid Fatalities Were Preventable*, LA PROGRESSIVE (Jun. 16, 2020), <https://www.laprogressive.com/l-a-nursing-home-fatalities/>; see also ASSOCIATED PRESS, *California Governor on the Hot Seat Over Pandemic Response*, U.S. NEWS (Aug. 14, 2020), <https://www.usnews.com/news/us/articles/2020-08-14/california-governor-on-the-hot-seat-over-pandemic-response>

²⁶⁵ Joe Barnas, *Illinois Failed to Investigate Nursing Home Complaints for 3 ½ Months of Pandemic*, ILLINOIS POLICY (Aug. 25, 2020), <https://www.illinoispolicy.org/illinois-failed-to-investigate-nursing-home-complaints-for-3-1-2-months-of-pandemic/>.

²⁶⁶ Rachel Monahan, *Three Months Into the Pandemic, Oregon Gov. Kate Brown Releases Plan to Test Staff at All Nursing Homes and Other Facilities; Brown has been pushed for months to back a plan for testing all nursing homes and long-term care facilities*, Willamette Week (Updated Jun.10, 2020), <https://www.wweek.com/news/state/2020/06/09/three-months-into-the-pandemic-oregon-gov-kate-brown-releases-plan-to-test-staff-at-all-nursing-homes-and-other-facilities/>.

²⁶⁷ *Id.*

entering nursing homes to conduct inspections, prompting more criticism from the local media.²⁶⁸

In addition, infection control appears to be a challenge, at least for some Oregon nursing homes: as noted above, one Portland facility made headlines in May when its infection control deficiencies led to over 100 cases and 28 fatalities.²⁶⁹ AARP noted:

“Across Oregon, deaths from COVID-19 have been concentrated in nursing homes, where at least 68 people have died. State regulators on Tuesday suspended the license for Healthcare at Foster Creek, a Portland nursing home, which has reported 28 deaths and 117 people testing positive for the virus.... This terrible issue will require both new policies and additional resources and investments to address the growing needs of Oregon’s most vulnerable older population. In particular, we are most concerned about the well-being of individuals living in adult residential care homes....”²⁷⁰

- **Pennsylvania.** Of the 6,649 COVID-19 deaths in Pennsylvania as of late June, 4,539 (or nearly 70%) were linked to nursing homes or senior care facilities.²⁷¹ In late June, the Pennsylvania attorney general’s office announced that it had initiated criminal investigations into several Pennsylvania nursing homes that allegedly failed to provide proper care during the pandemic.²⁷² More recently, the FBI, HHS OIG, and Internal Revenue Service executed search warrants at two facilities on September 5th.²⁷³

²⁶⁸ *Oregon doesn’t test senior care home inspectors for the coronavirus*, OREGON LIVE (Aug. 26, 2020), <https://www.oregonlive.com/coronavirus/2020/08/oregon-doesnt-test-senior-care-home-inspectors-for-the-coronavirus.html>

²⁶⁹ KGW8 Staff, *supra* note 127.

²⁷⁰ AARP, Webpage, “TELL GOV. KATE BROWN MORE NEEDS TO BE DONE TO PROTECT OREGONIANS LIVING IN NURSING HOMES” (last visited Sep. 21, 2020), available at <https://action.aarp.org/site/Advocacy?cmd=display&page=UserAction&id=8488>.

²⁷¹ Dennis Owens, *Did Wolf’s nursing home policy cost lives? Congress is now asking*, ABC 27 (Jun. 30, 2020), <https://www.abc27.com/news/local/harrisburg/did-wolfs-nursing-home-policy-cost-lives-congress-is-now-asking/>

²⁷² *Id.*

²⁷³ David Skinner, *FBI Raids Pennsylvania Nursing Homes*, KVOA (Sep. 5, 2020), <https://kvoa.com/news/2020/09/05/fbi-raids-pennsylvania-nursing-homes/> (describing raid on two facilities owned by the same company).

II. LESSONS LEARNED: WHAT WORKED BEST BEFORE AND DURING COVID-19 PANDEMIC

Media accounts suggest that some nursing homes, even those in jurisdictions designated as hot spots, escaped the worst effects of COVID-19. Here’s what facilities reportedly did right during the pandemic:

- They made early moves to lock down their facilities, ending in-person visitation and requesting that their staff not work at other nursing homes.²⁷⁴
 - They maintained adequate staffing levels, with some even offering bonuses or other incentives to employees to show up for work.
 - They had adequate personal protective equipment in advance of the pandemic as well as an infection control specialist who insisted on employees’ use of masks, gowns, and other protective equipment in the earliest phase of the pandemic.
 - They cleaned bathrooms, common areas, and door knobs more frequently,²⁷⁵ and they ensured the proper disposal, or decontamination of PPE.
 - They instituted a daily screening policy for entering employees and new residents and scrupulously adhered to it throughout the emergency period.
 - They relied on cohorting strategies, which ensured the isolation of the infected from uninfected residents and employees.
 - They performed intermittent testing of staff, to prevent the introduction of COVID-19 into their facilities,²⁷⁶ accompanied by contact tracing and isolation for those who tested positive.
 - They communicated promptly with public health officials and family members of residents who were impacted by this virus.
 - They had an excellent track record prior to the pandemic, with State Survey Agencies uncovering few deficiencies, especially in the area of infection control and prevention.
- **Visitation Restrictions:** Recognizing the enhanced vulnerability of the nursing home population to COVID-19, the more cautious administrators locked down their facilities at the end of February or beginning of March²⁷⁷—almost two weeks before the World Health Organization formally declared a pandemic on March 11th and CMS issued its March 13th guidance calling for nursing homes to restrict in-person visitation. Doing so proved to be effective in curbing the spread of the virus, but it certainly also increased the social isolation of residents. (Note that the impact of cutting off nursing home residents

²⁷⁴ Sarah Harrison, *supra* note 159.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Amna Nawaz, *supra* note 24.

from their family and friends for six months has not been exhaustively researched, but preliminary reports suggest that it has taken a toll on residents and their family members.)

- ***Innovative Staffing Incentives:*** Some facilities took steps, such as offering incentive payments, or bonuses, to care workers to ensure adequate staffing during the pandemic.²⁷⁸ (For example, one nursing home owner in Connecticut offered its staff large bonuses for two months to move into rented recreational vehicles located on-site.²⁷⁹ After two months, this facility had experienced no COVID-19 infections.²⁸⁰ Meanwhile, the rest of Connecticut had 1,627 deaths in 219 facilities.²⁸¹ The owner of assisted living facilities in Ohio did the same, housing 22 care workers with residents in inns for 65 days, with similarly successful results.)²⁸² In April, the State of Arkansas received approval from CMS to use Medicaid dollars to provide bonuses to health care workers in nursing homes and other long-term care facilities.²⁸³
- ***Effective Infection Control Planning:*** The most prepared nursing homes already had a full time inspection control specialist who insisted on employees’ use of masks, gowns, gloves, and other protective equipment at the outset of the COVID-19 outbreak in the United States.²⁸⁴ They also had in place an effective infection control plan, incorporating multiple techniques, before the national emergency.

As noted by researchers at University of Oxford, the five most significant techniques are use of proper hand hygiene measures; environmental decontamination (i.e. “daily cleaning of most touched surfaces and weekly deep clean”); allocation of nursing home

²⁷⁸ Chris Pope, *The Real Center of the Pandemic*, CITY JOURNAL (May 2020), https://www.city-journal.org/coronavirus-super-spreaders-nursing-homes?utm_source=outreach_nm&utm_medium=email.

²⁷⁹ Robin Young and Serena McMahon, *Connecticut Nursing Home Owner Puts Staff in On-Site RVs to Prevent COVID-19 Infections*, WBUR (May 18, 2020), <http://wbur.org/hereandnow/2020/05/18/nursing-home-coronavirus-rvs>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Abbey Roy Newark, *Newark nursing home staff goes home after 65-day state with residents to prevent virus*, THE COLUMBUS DISPATCH (May 22, 2020) (describing how 22 care workers in Ohio sheltered in place with residents at hotels for 65 days, and then “went home without a single case of COVID-19 penetrating their assisted living communities”).

²⁸³ Chris Marr, *Arkansas Gets Federal Ok for COVID-19 Health Worker Bonuses*, BLOOMBERG (April 15, 2020), <https://news.bloomberglaw.com/daily-labor-report/arkansas-gets-federal-ok-for-covid-19-health-worker-bonuses>

²⁸⁴ Olga Khazan, *supra* note 113; Amna Nawaz, *supra* note 24.

staff to just one facility consistently (to reduce virus transmission across locations); a policy of restricting visitors to emergencies or critical cases; and diagnostic testing.²⁸⁵

- **Training in Proper Handwashing and Hygiene Techniques.** Some facilities offered training to their staff in, or displayed posters demonstrating, proper handwashing techniques.²⁸⁶ Others also encouraged their staff to shower and change at the end of shifts in designated areas at the facility before leaving unit, thereby reducing the spread of COVID-19 in the community or at their homes.²⁸⁷
- **Efforts to Ensure Access to Personal Protective Equipment:** The most prepared facilities had a weeks-long supply of personal protective equipment, or PPE, already on hand before the pandemic.²⁸⁸ Other facilities stretched their limited supplies of PPE by relying on a State-operated decontamination system to clean N95 masks, gowns, and keys.²⁸⁹ Still others used an ultra violet machine to disinfect face shields, masks, keys, and other items.²⁹⁰ One facility even conserved PPE through use of baby nursery cameras in COVID-19-positive rooms: using the baby monitors, care workers could first do a quick check on an infected patient remotely to assess whether a personal visit was needed, rather than automatically make the usual hourly, in-person visit to the patient’s room.²⁹¹
- **Increased Cleaning and Disinfection:** Some facilities devoted additional time to cleaning bathrooms, common areas, and door knobs more frequently,²⁹² and they also ensured the proper disposal or decontamination of PPE.²⁹³ Some also opened windows to introduce fresh air into the building.²⁹⁴

²⁸⁵ Larry J. Strausbaugh, Shirin R. Sukumar, et al., *supra* note 34.

²⁸⁶ CMS, “Toolkit on State Actions to Mitigate COVID-19 Prevalence in Nursing Homes (Sep. 2020), available at <https://www.cms.gov/files/document/covid-toolkit-states-mitigate-covid-19-nursing-homes.pdf>.

²⁸⁷ *Id.*

²⁸⁸ Olga Khazan, *supra* note 113.

²⁸⁹ CMS, *supra* note 286.

²⁹⁰ *Id.*

²⁹¹ Kristi O’Connor, “Atrium Health Nurses Use Baby Monitors to Conserve Personal Protective Equipment,” WBTV (May 19, 2019), <https://www.wbtv.com/2020/05/19/atrium-health-nurses-use-baby-monitors-conserve-personal-protective-equipment/>.

²⁹² Sarah Harrison, *supra* note 159.

²⁹³ *Id.* at 6.

²⁹⁴ CMS, *supra* note 286.

- **Screening of Employees.** Practices recommended by one state agency include keeping a list of all staff who work in multiple facilities, requiring staff self-monitoring, and requiring all staff to report by phone before reporting to work if they have had exposure to, or symptoms of, COVID-19.²⁹⁵ The more cautious did not merely adopt a screening policy for entering employees and residents: they scrupulously adhered to it on a daily basis throughout the emergency period. Equally important, they also requested that staff work only in their facility and not others.²⁹⁶
- **Cohorting Strategies.** Facilities that consistently applied “cohorting strategies,” or techniques to ensure isolation of the infected from uninfected residents and employees in a dedicated unit, as recommended by the CDC, seem to have achieved better results. (Smaller facilities can house the infected in separate private rooms and bathrooms,²⁹⁷ while larger facilities can assign the infected to COVID-19 only wards or separate facilities designated for coronavirus recovery.) One State even required nursing homes with COVID-19 outbreaks to transfer residents to local hospitals, regardless of whether they showed COVID-19 symptoms (and transferred residents had to test negative for the virus twice within 48 hours before returning to their nursing home).²⁹⁸ The more prepared facilities also had in place an isolation policy for new admissions (or readmissions) coming from the hospital.²⁹⁹
- **Enhancing Residents’ Resilience.** To minimize the impact on residents of visitation restrictions, at least one facility hired more activity staff to ensure residents had daily visits,³⁰⁰ while others found new ways to help residents communicate with friends and family members. For example, some offered “televisitation,” or video conferencing with residents’ friends and family members.³⁰¹ These initiatives helped counter the negative effects of social isolation during the pandemic.

²⁹⁵ TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *supra* note 72.

²⁹⁶ *Id.*

²⁹⁷ National Association of Counties, Webpage, “Brief: Nursing Homes & COVID-19” (June 2020), available at https://www.naco.org/sites/default/files/documents/Nursing%20Homes%20and%20COVID-19_v5_06.19.20.pdf (citing CDC recommendation that facilities should set aside special medical equipment for the infected, and “isolate symptomatic patients as soon as possible by assembling separate, well-ventilated triage areas and placing patients with suspected or confirmed COVID-19 in private rooms with the door closed, and with private bathrooms where possible”).

²⁹⁸ Cindy Krischer Goodman, *Florida transferring nursing home residents with coronavirus into hospitals*, SOUTH FLORIDA SUN SENTINEL (May 13, 2020), <http://www.sun-sentinel.com/coronavirus/fl-ne-coronavirus-nursing-homes-mass-transfers-20200513-vdpc2txp7jeztepngt3dsk3eve-story.html>.

²⁹⁹ CMS, *supra* note 286.

³⁰⁰ Amna Nawaz, *supra* note 24.

Experts also encourage offering accurate information on the local outbreak situation through access to traditional media, such as television and radio, to help residents without digital access stay connected to the outside world and reduce mental stress.³⁰² Policies to promote proper sleep, adequate nutrition, exercise, and access to morning sunlight by residents also can promote physical resilience and reduce frailty, say experts.³⁰³

- **Communication/Transparency.** The most transparent facilities communicated with residents, staff, and family members about exposure to probable or confirmed COVID-19 cases promptly³⁰⁴ (ideally within 12 hours). They post daily updates on their website or on social media. They post contact information for the local or state health agency prominently on all shifts, and they involved residents in care planning.³⁰⁵ Prompt reporting of cases to the CDC by nursing homes (as required by CMS) also helps ensure that relief assistance goes to where it is most needed.³⁰⁶
- **COVID-19 Testing.** Intermittent testing is optimal to protect people in nursing homes, according to Dr. Anthony Fauci, who leads the National Institute of Health’s National Institute of Allergy and Infectious Diseases and sits on the White House’s coronavirus task force.³⁰⁷ Last month, CMS announced periodic testing requirements for staff and residents of Medicare- and Medicaid-enrolled nursing facilities.³⁰⁸

³⁰¹ Stonerise Healthcare LLC, Webpage (last visited Sept. 21, 2020), available at <https://stonerisehealthcare.com/coronavirus-updates/>

³⁰² Wee-Shiong Lim, Chich-Junang Liang, et al, *COVID-19 and older people in Asia; Asian Working Group for Sarcopenia calls to action*, GERIATRICS GERONTOLOGY (May 4, 2020), available at <https://doi.org/10.1111/ggi.13939>.

³⁰³ *Id.*

³⁰⁴ TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *supra* note 72.

³⁰⁵ *Id.*

³⁰⁶ CDC, Webpage, “Core Practices” (last visited Sept. 21, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html> (calling for nursing homes to “[r]eport COVID-19 cases, facility staffing and supply information to the National Healthcare Safety Network (NHSN) Long-term Care Facility (LTCF) COVID-19 Module weekly”); CMS, Memorandum to State Survey Agency Directors (May 6, 2020), available at <https://www.cms.gov/files/document/qso-20-29-nh.pdf> .

³⁰⁷ Alex Spanko, *Fauci: Nursing Homes Need ‘Pristine, Unassailable’ Infection Control Amid COVID-19*, SKILLED NURSING NEWS (May 12, 2020) (quoting Dr. Anthony Fauci, who has said that intermittent, rather than daily, testing is sufficient to ensure “optimal protection” of people in nursing homes), <https://skillednursingnews.com/2020/05/fauci-nursing-homes-need-pristine-unassailable-infection-control-amid-covid-19/>.

³⁰⁸ CMS, Press Release: “CMS posts guidance for implementing new testing requirements in nursing homes and labs” (Aug. 26, 2020), available at

Although Congress has adopted several relief packages, which make billions of dollars available to the States for COVID-19 testing, diagnostic testing remains extremely costly for the nursing home sector. By one account, \$440 million is the cost of *one-time* COVID-19 testing for nursing homes across the United States.³⁰⁹

In nursing home populations with a high rate of infection, diagnostic “testing practices should aim for rapid turnaround times (e.g., less than 24 hours) in order to facilitate effective interventions,” as recommended by the CDC. To streamline the diagnostic testing process, a State laboratory in Iowa created electronic order forms and a web portal, <https://covidtesting.shl.uiowa.edu/>, by which nursing homes may order test kits and schedule pickup to deliver the tests to the laboratory.³¹⁰

“Pooling” is a promising, potentially cost-effective testing method to consider for surveillance purposes, especially in populations with a low COVID-19 case rate. (The technique involves combining respiratory samples from four to eight people prior to testing, and conducting one laboratory test on the combined pool of samples to detect the virus.³¹¹ If a pooled test result is negative, then all the samples can be presumed negative with a single diagnostic test; if, on the other hand, the pooled test result is positive, each sample in the pool will need to be retested individually,³¹² to determine which are positive.)

As of June, CMS indicated that “there are no tests authorized by FDA [Food and Drug Administration] for use on pooled specimens.”³¹³ But the FDA authorized Stanford’s

<https://www.cms.gov/newsroom/press-releases/cms-posts-guidance-implementing-new-testing-requirements-nursing-homes-and-labs>.

³⁰⁹ Kimberly Bonvissuto, *\$672 million would be cost of one-time COVID-19 testing for all assisted living and nursing home residents, staff, AHCA/NCAL says*, MCKNIGHT’S SENIOR LIVING, (May 28, 2020), available at <https://www.mcknightsseniorliving.com/home/news/672-million-would-be-cost-of-one-time-covid-19-testing-for-all-assisted-living-and-nursing-home-residents-staff-ahca-ncal-says/>

³¹⁰ CMS, *supra* note 286 at 27.

³¹¹ CDC, Webpage, “Interim Guidance for Use of Pooling Procedures in SARS-CoV-2 Diagnostic, Screening, and Surveillance Testing” (updated Aug. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/lab/pooling-procedures.html>.

³¹² *Id.*

³¹³ CMS, Webpage, “Frequently Asked Questions: Surveillance Testing” (last visited Sept. 21, 2020), available at <https://www.cms.gov/files/document/06-19-2020-frequently-asked-questions-covid-surveillance-testing.pdf>. CMS also noted: “According to the FDA website, ‘Surveillance with pooled or batched testing should be validated on a test platform and test of high sensitivity and positive tests should have a confirmatory test. Because samples are diluted, which could result in less viral genetic material available to detect, there is a greater likelihood of false negative results, particularly if not properly validated.’ To possibly mitigate this risk, all positive and inconclusive SARS-CoV-2 results from pooled sampling must be confirmed by having each participant whose sample was contained within the cohort to be tested by a CLIA-certified facility.” *Id.*

Clinical Virology Laboratory to begin using the technique in July,³¹⁴ while the FDA completes its review of this technique; and pooled testing reportedly already is in use to screen blood donations for the presence of HIV or hepatitis.³¹⁵ Proponents say that it is ideal for use in congregate living facilities, such as nursing homes, and “works best for screening populations in which most samples are expected to be negative, rather than groups with many infected people.”³¹⁶

- **Reliance on State Strike Teams.** Some governors have dispatched strike, or surge, teams to launch a coordinated response to struggling nursing homes. These teams (typically comprised of public health officials or specially-trained and equipped National Guard members) perform disinfection of long-term care facilities, supervise diagnostic testing, bring in needed medical supplies, or otherwise assist nursing homes in crisis.³¹⁷
- **Access to PPE Decontamination Systems.** To help this sector stretch thin supplies of PPE, some governors also have made decontamination systems available, at no charge, to nursing homes to decontaminate their equipment.³¹⁸

In summary, many nursing homes have instituted measures, during the national emergency period, which proved helpful in curbing the spread of the virus, stretching thin supplies of PPE, and reassuring residents’ family members. Some governors also led the way in making decontamination systems available to nursing homes and dispatching “strike teams” to rescue failing nursing homes at critical points during the national emergency. Such measures would be even more meaningful if all facilities and State officials followed their lead.

³¹⁴ Krista Conger, “Stanford Health Care Can Begin Pooled Testing for COVID-19,” Stanford Univ. (July 2020), available at <https://med.stanford.edu/news/all-news/2020/07/stanford-health-care-can-begin-pooled-testing-for-covid-19.html>.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ See, e.g., Kaelan Deese, *Maryland announces first in the nation ‘strike teams’ to tackle coronavirus in nursing homes*, THE HILL (Apr. 7, 2020), <https://thehill.com/homenews/state-watch/491623-maryland-gov-announces-first-in-the-nation-strike-teams-to-tackle>.

³¹⁸ CMS, *supra* note 286. For instance, the State of Alabama has access to a Battelle Critical Care Decontamination Systems (CCDS), located in Birmingham. Hospitals, nursing homes, and other health care providers are encouraged to send their N95 masks for decontamination, free of charge, including shipping; the unit can decontaminate 80,000 masks per day. *Id.*; see also Alabama Hospital Association, Webpage, “Initiating Battelle N95 Decontamination” (last visited Sept. 21, 2020), available at <https://www.alaha.org/initiating-battelle-n95-decontamination>.

III. RECOMMENDATIONS FOR CONGRESS

The COVID-19 pandemic continues to take the lives of the elderly in nursing homes across the United States. As Congress considers a future relief package, certain policies are important to consider.

- As detailed in this report, many nursing homes struggled with infection control long before the COVID-19 outbreak. A robust infection control program serves as a first line of defense in the face of a raging pandemic, and can save lives. The vastly different outcomes of Hong Kong nursing facilities’ experiences during the SARS and COVID-19 outbreaks bear that out. Unfortunately, for too long, regulators in many jurisdictions have not accorded sufficient emphasis to ensuring that nursing homes’ infection control programs are sufficiently robust to prevent the spread of infectious disease.

To remedy this deficiency, we recommend that CMS revisit its infection control policies (an issue raised by Chairman Grassley in an April 17th letter to CMS Administrator Seema Verma and HHS Secretary Alex Azar at the Department of Health and Human Services). We also recommend development of a more sophisticated infection control plan be included as one condition of participation in the Medicare and Medicaid programs.

- To help nursing homes promptly identify and contain outbreaks of COVID-19, a portion of Federal COVID-19 relief assistance should be used for the purchase of personal protective equipment and to support diagnostic testing in nursing homes (as proposed by Chairman Grassley and Senators Steve Daines, Martha McSally, and Joni Ernst in the *Emergency Support for Nursing Homes and Elder Justice Reform Act of 2020* (S. 4182)).³¹⁹ Rapid testing should be encouraged for COVID-19 diagnostic purposes, and, although additional information is needed on the merits of pooled testing, it seems to be a promising surveillance technique for the nursing home population, especially in communities with a low COVID-19 positivity rate.
- Strike teams have shown great promise as a method for helping nursing homes in crisis get their COVID-19 outbreaks under control. We recommend that jurisdictions receiving Federal relief assistance during the COVID-19 emergency period devote some of this funding to the development and maintenance of statewide or regional strike teams for struggling nursing homes, as proposed by Chairman Grassley in S. 4182. In addition, Congress should make resources available for Federal strike teams to support State strike team efforts in hard hit

³¹⁹ Chairman Grassley, Press Release: “Grassley, Daines, McSally Introduce Elder Justice Legislation to Boost Programs, Help Fight COVID in Nursing Homes,” (Jul. 6, 2020), available at <https://www.finance.senate.gov/chairmans-news/grassley-daines-mcsally-introduce-elder-justice-legislation-to-boost-programs-help-fight-covid-in-nursing-homes>.

areas, as proposed by Chairman Grassley in *The American Workers, Families, And Employers Assistance Act* ([S. 4318](#)).³²⁰

- Visitation restrictions, communal dining restrictions and quarantine requirements, while necessary to curb the spread of the coronavirus, have taken a heavy toll on nursing home residents in recent months. Public health officials in some States recently announced that in-person visitation would resume outdoors under specified conditions,³²¹ and CMS this month also issued guidelines on this subject.³²² To further reduce the adverse impacts of social isolation on residents, a portion of Federal relief assistance should be devoted to use of technologies that will enable nursing home and assisted living facility residents to communicate remotely with family members and friends (as proposed by Chairman Grassley in a floor amendment filed on August 6th).³²³
- Nursing homes should continue to submit payroll data to CMS, to ensure there is sufficient transparency concerning the impact of staffing shortages on nursing homes during the entire public emergency period, as proposed by Senators Grassley, Daines, McSally, and Ernst in S. 4182. Nursing homes also should continue their screening of staff and essential visitors, and, to the extent practicable, these facilities should request that their staff avoid working in multiple facilities during the pandemic
- We recommend that nursing home operators have access to the National Practitioner Data Bank (NPDB) (an existing national background check system), as proposed by Senators Tim Scott and Mark Warner. Enabling nursing home employers to access the NPDB would permit the screening of potential employees, to ensure that certified nursing assistants do not have a history that would endanger the seniors under their care. We also encourage

³²⁰ Chairman Grassley, Press Release: “Grassley Releases Finance Committee Provisions in Next Coronavirus Relief Legislation” (Jul. 27, 2020), available at <https://www.finance.senate.gov/chairmans-news/grassley-releases-finance-committee-provisions-in-next-coronavirus-relief-legislation>. The House-passed HEROES Act, introduced on May 12th, also would provide \$150 million in relief assistance for strike teams. H.R. 6800, Available at <https://docs.house.gov/billsthisweek/20200511/BILLS-116hr6800ih.pdf>.

³²¹ South Carolina Department of Health and Environmental Control (hereinafter “DHEC:), Webpage, “DHEC Provides New Guidelines for Limited Outdoor Visitation at Nursing Homes and Assisted Living Facilities (Sep. 1, 2020), available at <https://scdhec.gov/news-releases/dhec-provides-new-guidelines-limited-outdoor-visitation-nursing-homes-assisted-living>.

³²² CMS, Memorandum to State Survey Agency Directors (dated Sep. 17, 2020), available at <https://www.cms.gov/files/document/qso-20-39-nh.pdf>.

³²³ See S. Amdt. 2627 (floor amendment to S. 178), filed Aug. 6, 2020 by Senators Grassley, Daines, and McSally, <http://ats.senate.gov/Display.aspx?ID=2627>.

participation in the existing CMS National Background Check Program.³²⁴

- Programs authorized by the Elder Justice Act help promote the health and safety of older Americans living in long-term care facilities. We recommend the reauthorization of these programs, as proposed in S. 4182, legislation introduced by Chairman Grassley and Senator Daines. We also recommended their continued funding, either through the Prevention and Public Health Fund or the annual congressional appropriations process.³²⁵
- Congress should encourage CMS to adopt any outstanding HHS OIG recommendations relating to nursing home abuse and neglect, to ensure that violations are promptly identified and corrected, as discussed during a Finance Committee hearing convened by Chairman Grassley and Ranking Member Ron Wyden in July 2019.³²⁶
- Congress should expand the ability of Medicaid integrity programs to investigate Medicaid abuse beyond traditional health care facility settings, because Federal law has not kept pace with the changing settings in which Medicaid patients seek care. S. 2379, proposed by Senator Crapo (with Chairman Grassley as well as Senators Benjamin Cardin, John Thune, Margaret Wood Hassan, Pat Roberts, and others as cosponsors), would clarify the authority of Medicaid Fraud Control Unit (MFCUs) to investigate and prosecute Medicaid fraud and

³²⁴ CMS, Webpage, “CMS National Background Check Program” (last visited Sep. 20, 2020), available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/BackgroundCheck>. CMS has awarded more than \$64 million to 26 States to design a comprehensive national background check program for nursing home employees having direct patient access. *Id.* (The program is administered by CMS in consultation with the U.S. Department of Justice and FBI.) As noted by CMS: “Title VI, Subtitle B, Part III, Subtitle C, Section 6201 of the Affordable Care Act of 2010 (P.L. 111-148) established the framework for a nationwide program to conduct background checks on a statewide basis on all prospective direct patient access employees of LTC facilities and providers. LTC facilities and providers include skilled nursing and nursing facilities, home health agencies, hospice and personal care providers, LTC hospitals, residential care providers arranging for or providing LTC services, and intermediate care facilities for individuals with intellectual disabilities....” *Id.*

³²⁵ Congressional appropriators did not provide funding for most Elder Justice Act activities prior to fiscal year 2015, but some of the statute’s activities have received funding from mandatory funding appropriated through the Affordable Care Act’s Prevention and Public Health Fund (hereinafter “PPHF”), according to the nonpartisan Congressional Research Service. CONG. RESEARCH SERVC., R43707, *The Elder Justice Act: Background and Issues for Congress* (updated Jan. 24, 2017), <https://www.everycrsreport.com/reports/R43707.html>. “As a result of this limited federal funding, the federal government has not substantially developed and expanded its role in addressing the prevention, detection, and treatment of elder abuse.” *Id.*

³²⁶ U.S. Senate Finance Committee, Hearing: “Promoting Elder Justice: A Call for Reform,” (Jul. 23, 2020), available at <https://www.finance.senate.gov/hearings/promoting-elder-justice-a-call-for-reform>.

beneficiary abuse in non-institutional settings.³²⁷ Its enactment would ensure that MFCUs can conduct oversight of home-and community based settings to verify that patients are safe and taxpayer funds are not being misused.³²⁸

- Congress should more carefully examine the issue of racial disparities in nursing homes, e.g., by convening a commission to examine this issue, as recommended by Chairman Grassley in an August 6th legislative proposal.³²⁹
- Outside of the nursing home context, Congress also should devote additional attention to the area of guardianship, to reduce the risk of abuse, neglect, or exploitation of individuals under the care of guardians. The bipartisan *Guardianship Accountability Act* (S. 591), sponsored by Senators Susan Collins and Robert Casey, is an example of a proposal that tackles this issue. The measure would expand the availability of federal demonstration grants, authorized by the Elder Justice Act, to ensure that Federal funds can be used for developing state guardianship databases to collect information on guardians, training for court visitors, and sharing information on guardian background checks with appropriate entities.³³⁰ This legislation has been referred to the Senate Judiciary Committee.
- Both chambers should adopt the *Promoting Alzheimer’s Awareness to Prevent Elder Abuse Act*. This bipartisan legislation, which passed the Senate last month, was introduced by Senators Susan Collins, Robert Menendez and Grassley in May.³³¹ It would amend the Elder Abuse Prevention and Prosecution Act (EAPPA) to require the National Elder Justice Coordinator at the Department of Justice (DOJ) to take into account individuals with

³²⁷ See U.S. Senator Mike Crapo, “Weekly Column: Medicaid Patient Abuse Prevention Legislation” (Sep. 15, 2019), available at <https://www.crapo.senate.gov/media/editorials/weekly-column-medicare-patient-abuse-prevention-legislation>. A bipartisan companion bill, known as the Medicaid Patient Abuse Prevention Act (H.R. 233) has been introduced in the other chamber by Representatives Tim Walberg (R-Michigan) and Peter Welch (D-Vermont). *Id.*

³²⁸ U.S. Senator Tim Scott, Press Release: “Warner, Scott Introduce Bill to Improve Hiring and Retention of Senior Caregivers (2019), available at <https://www.scott.senate.gov/media-center/in-the-news/warner-scott-introduce-bill-to-improve-hiring-retention-of-senior-caregivers> .

³²⁹ See S. Amdt. 2641 (Grassley second-degree amendment) to S. Amdt. 2499 (first degree amendment to S. 178), filed Aug. 6, 2020, <http://ats.senate.gov/Display.aspx?ID=2641>.

³³⁰ U.S. Senator Susan Collins, Press Release: “Senators Collins, Casey Introduce Bipartisan Bill to Protect Individuals Under the Care of Guardians (Mar. 2019) (noting that “[t]he legislation would implement many of the recommendations from the Aging Committee’s year-long investigation of guardianship abuse), available at <https://www.collins.senate.gov/newsroom/senators-collins-casey-introduce-bipartisan-bill-protect-individuals-under-care-guardians>.

³³¹ U.S. Senator Charles E. Grassley, Press Release: “Senate Unanimously Passes Bill to Protect Seniors with Alzheimer’s & Other Dementias from Elder Abuse” (Aug. 7, 2020), available at <https://www.grassley.senate.gov/news/news-releases/senate-unanimously-passes-bill-protect-seniors-alzheimer-s-other-dementias-elder>

Alzheimer’s disease and related dementias when developing elder abuse training materials, as required under EAPPA.³³² It also calls for DOJ to review and update its existing training materials to include individuals with Alzheimer’s disease and related dementias.³³³

CONCLUSION³³⁴

This report offers members of this Committee some additional background on the challenges that many nursing homes have faced, and continue to face, during this year’s public health emergency period. It makes specific recommendations for Congress, based on best practices that these facilities and some public officials adopted during the pandemic to protect nursing home residents and personnel. It includes additional recommendations to better protect the nation’s older Americans from elder abuse, neglect, and exploitation. Many of these recommendations are embraced in legislation previously filed by Chairman Grassley or other members of the United States Senate. (The recommendations in this report do not substitute for official guidance, issued by CMS and the CDC during the pandemic, to reduce the transmission of COVID-19 nursing homes.)

³³² Elder Justice Coalition, Congressional Update: “Sens. Collins, Menendez, and Grassley Introduce Bill on Alzheimer’s and Elder Abuse” (May 2020), available at <https://myemail.constantcontact.com/Congressional-Update--New-Legislation-and-More-.html?soid=1112456211093&aid=EutwbNRqJXo..>

³³³ *Id.*

³³⁴ Evelyn Fortier, Chief Counsel for Special Projects & General Counsel for Health to Chairman Grassley, led the development of this report, under the supervision of Committee Staff Director & Chief Counsel Kolan Davis. Nick Bartine (detailed to the Committee staff by the U.S. Government Accountability Office) as well as Rachael Soloway of the majority professional staff, also provided assistance in its development.