LESSONS THE LONG-TERM CARE INDUSTRY CAN LEARN FROM THE COVID-19 PANDEMIC

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I. INTRODUCTION

The COVID-19 pandemic has hit the world harder than any other crisis in the twenty-first century,[1] and it also shed light on a crisis that has plagued America for decades—neglect, mismanagement, and inadequate oversight in nursing homes and, more generally, long-term care facilities ("LTCs").[2] "Consistent with the neglect that caused these flaws, the federal government offered beleaguered nursing homes weak and inconsistent aid to save lives when the pandemic predictably ravaged senior communities across the country."[3]

Because elders are at high risk of serious complications from COVID-19, many nursing homes and LTCs have experienced devastating outbreaks.[4] In the United States, "reported data through August 13, 2020 show that 8% of COVID-19 cases and 41% of COVID-19 deaths in the

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1. António Guterres, *"This is, Above All, a Human Crisis That Calls for Solidarity"*, UNITED NATIONS (Mar. 20, 2020), https://www.un.org/en/un-coronavirus-communications-team/above-all-human-crisis-calls-solidarity.

2. Karen W. Feinstein, *What COVID-19 Exposed in Long-Term Care*, HEALTH AFFS. (Nov. 5, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201104.718974/full/. "Long term care facilities provide a variety of services, both medical and personal care, to people who are unable to live independently." *Nursing Homes and Assisted Living (Long-Term Care Facilities [LTCFs])*, CDC, https://www.cdc.gov/longtermcare/index.html (last visited Aug. 28, 2021). The CDC considers skilled nursing facilities, nursing homes, and assisted living facilities as LTCs and notes that one to three million serious infections happen per year there. *Id*.

3. Feinstein, *supra* note 2.

4. Avik Roy, *The Most Important Coronavirus Statistic: 42% of U.S. Deaths Are from 0.6% of the Population*, FORBES (May 26, 2020, 12:14 PM EDT), 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/?sh=35156ed974cd.

United States have occurred among residents and staff."[5] This issue has been a focal point in Florida because citizens aged sixty-five and older make up 20.9% of the over 21.5 million population—nearly 4.5 million elders call Florida home.[6] Florida houses nearly 700 nursing homes that care for about 70,000 residents, the sixth highest in the nation,[7] which indicates an opportunity for growth: Florida can strive to become the nation's best elder care state.[8] Because the industry was so ill-equipped to handle a disaster[9], the data suggests that even the best efforts of the executive branch could only go so far to mitigate deaths in nursing homes and LTCs.

As this Article will later explore, a large-scale disaster, like COVID-19, was bound to expose the severe deficiencies in nursing homes, because the majority of LTCs lacked safeguards to prevent and mitigate disaster.[10] Thus, while the executive branch possessed the constitutional power to issue various restrictions on nursing homes,[11] those orders were subject to costly litigation, claiming constitutional violations; thus, they are not the most effective solution to the problems surrounding nursing homes. Instead, legislative reform will more effectively address the problems and ensure that the nursing homes are proactively prepared to maintain their quality of care, which will ultimately maximize resident safety. Nursing homes could benefit from legislative reform that promotes increased resources and more efficient management to ensure that elders receive a sufficient quality of care, especially during emergencies.[12]

Before diving into the shortcomings in nursing homes, it is important to understand the overall response to COVID-19 because governments struggled to find the most efficient method to mitigate the virus. Early on, the United States Center for Disease Control and

5. *See* Roya Agahi et al., *Coronavirus Commission for Safety and Quality in Nursing Homes*, MITRE 9 (Sept. 2020), https://sites.mitre.org/nhcovidcomm/wp-content/uploads/sites/14/2020/09/FINAL-REPORT-of-NH-Commission-Public-Release-Case-20-2378.pdf. This Article will provide a brief overview of the MITRE report findings in Part IV. *See* discussion *infra* pt. IV.

6. *Quick Facts Florida*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/FL (last visited Aug. 28, 2021). Florida comes second in percentage of elders, just shy of Maine's 21.3%. *Id*.

7. Vitorio Nastasi, *Protecting Florida's Most Vulnerable: Market Based Reform to Improve Nursing Home Care*, JAMES MADISON INST. 2 (Jan. 5, 2021), https://www.jamesmadison.org/wp-content/uploads/2021/01/PolicyBrief_Nursing_Homes_Dec2020_v02.pdf. This number will only continue to grow, because population estimates indicate that 25% of Floridians will be over sixty-five by 2035. *Id*.

8. *Id*.

9. Feinstein, *supra* note 2.

10. Rachel Werner, Allison Hoffman, & Norma Coe, *Long-Term Care Policy After Covid-19 — Solving the Nursing Home Crisis*, 383 NEW ENG. J. MED. 903, 903 (2020).

11. *See infra* pt. II (explaining the judicial test for an executive order's constitutionality).

12. *Id*.

Prevention (the "CDC") issued guidance suggesting the use of face coverings, social distancing, quarantining, increased hygiene, increased disinfection of surfaces, etc.[13] Accordingly, governors and mayors issued a wide spectrum of orders to protect vulnerable nursing homes, such as lockdowns, personal protective equipment ("PPE") mandates, and readmission criteria.[14] This Article does not seek to find the ideal executive order; instead, it explores the various types of orders to argue that these approaches will be ineffective to provide recourse for problems with nursing homes during the pandemic and, ultimately, the long overdue regulatory reform that nursing homes so desperately need.

Nevertheless, an explanation of the constitutional arguments will demonstrate why executive action would always be ineffective against the COVID-19 pandemic. On the most basic level, the pandemic response has varied across the country because the United States Constitution delegates certain powers to the federal government; and where the Constitution does not specifically delegate a power, it is reserved to the states.[15] Governors have certain powers—commonly called police powers—to issue orders, such as lockdowns, to protect their citizens' health.[16] During emergencies, such as wars or pandemics, "each state authorizes its governor to declare a state of emergency."[17] From there, municipalities have the general power to exercise the same police powers as the state government, so long as they stay within the bounds of general state laws. There are two approaches to municipal police power: "Dillon's rule" and "home rule."[18] Florida takes the broader

13. *Considerations for Restaurants and Bars*, CDC (July 17, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html; Ivan Pereira & Arielle Mitropoulos, *A Year of COVID-19: What Was Going on in the U.S. in March 2020*, ABC NEWS, https://abcnews.go.com/Health/year-covid-19-us-march-2020/story?id=76204691 (last updated June 14, 2021).

14. Cara Bayless, *The Attys and Legal Logic Behind Stay-at-Home Orders*, LAW360 (Mar. 27, 2020), https://www.law360.com/articles/1257888/the-attys-and-legal-logic-behind-stay-at-home-orders; *State Actions Addressing COVID-19 in Long-Term Care Facilities*, NAT'L GOVERNORS ASS'N (Oct. 15, 2020), https://www.nga.org/center/publications/state-actions-long-term-care-facilities/.

15. *See* U.S. CONST. amend. X. This fundamental principle of the constitution is known as federalism. JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW IN A NUTSHELL* 1–3 (10th ed. 2020).

16. *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, A.B.A. (Apr. 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/.

17. Pam Greenberg, *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx (last updated Oct. 21, 2020).

18. Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 SEATTLE U. L. REV. 809, 809 (2015). With home rule, the relationship between cities and state governments is structured

"home rule" approach, with statutory law giving "municipalities . . . the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, *except when expressly prohibited by* [state statutory] *law*."[19]

In the rush to issue orders, state executives had to tiptoe "through a legal minefield" of constitutional rights.[20] Police power is not absolute, and an overly aggressive use of this power risks violating freedoms guaranteed by the Bill of Rights—this ensures that constitutional rights do not end during a pandemic.[21] State governments are left with the power to "place reasonable restrictions on those rights—provided they are not arbitrary, capricious, or oppressive, and are substantiated by facts and science."[22] Thus, as Part II will analyze, executive orders face constitutional obstacles and do not address the problems with the LTC industry as effectively as the state and federal legislative branches.[23]

Despite the varied restrictions issued by state officials, one factor remains constant—COVID-19 is a dangerous disease, especially for those aged sixty-five or older.[24] Because one-quarter of American citizens aged sixty-five or older reside in Florida, Texas, New York, and California, those states have had to be extra cautious in handling the disease.[25] While governors and their orders are criticized largely based on their political affiliation,[26] the aforementioned states have two things in common: similar numbers of COVID-19 cases and related deaths among those in nursing homes.[27] As explained by the World Health

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"so that the cities are empowered 'to administer [their] own affairs to the maximum degree' with 'the right to determine the form of government' and 'to define the nature and scope of municipal services involving matters of purely local concern.'" *Id.* at 810. In contrast, Dillon's Rule "limits local government powers to those expressly granted by statute or those necessarily implied." *Id.* at 811.

19. FLA. STAT. § 166.021(1) (2020) (emphasis added).

20. Bayless, *supra* note 14.

21. Diane M. Magee, *Article: The Constitution and Federalism in the Age of Pandemic*, 68 R.I. BAR J. 11, 13–14 (2020).

22. *Id.* at 14.

23. *See infra* pt. II.

24. *See COVID-19: Who's at Higher Risk of Serious Symptoms?*, MAYO CLINIC (May 18, 2021), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-who-is-at-risk/art-20483301.

25. Christine L. Himes & Lillian Killduff, *Which U.S. States Have the Oldest Populations?*, POPULATION REFERENCE BUREAU (Mar. 16, 2019), https://www.prb.org/which-us-states-are-the-oldest/.

26. *See* Ronald Brownstein, *Red and Blue America Aren't Experiencing the Same Pandemic*, ATLANTIC (Mar. 20, 2020), https://www.theatlantic.com/politics/archive/2020/03/how-republicans-and-democrats-think-about-coronavirus/608395/.

27. *COVID-19 Nursing Home* Data, CNTRS. FOR MEDICARE & MEDICAID SERVS., https://data.cms.gov/covid-19/covid-19-nursing-home-data (last updated Aug. 15, 2021) (finding respective deaths per 1,000 in California, Florida, New York, and Texas to be 99.8, 78.5, 107.1, and 116.7).

Organization, LTCs are particularly vulnerable to the disease because "once COVID-19 infection is present in long-term care facilities it is difficult to control, in part due to the large number of people living close together in facilities designed for communal living and the fact that personal care requires close proximity."[28] The difficulty of controlling infections in LTCs coupled with the inherent vulnerability of elders created a crisis in that LTCs lacked disaster preparedness.[29] They were ill-prepared to handle something as serious as the COVID-19 pandemic; "[t]hey lacked the resources necessary to contain the outbreak, including tests and PPE, and their staff are routinely underpaid and undertrained."[30] Since many of these problems appear to stem from poor preparation, this Article will explore means through which the LTC industry can improve and stay prepared for future disasters.

Part II will summarize and analyze the executive response to COVID-19 regarding LTCs. Part III will discuss LTCs failure to prepare for emergencies and how it contributed to their vulnerability during the COVID-19 pandemic. Part IV will analyze which nursing homes and ownership structures were the most successful in handling COVID-19 to introduce a solution that could help the industry react to future crises. Finally, the conclusion will tie together solutions that the long-term care industry and governments can implement to ensure that facilities can maintain a reasonable standard of care and disaster mitigation during times of emergency.

II. EXECUTIVE RESPONSE TO COVID-19 IN LONG-TERM CARE FACILITIES

Throughout the pandemic, state and local officials struggled to find the ideal method to protect elders.[31] At the start of the pandemic, Florida Governor Ron DeSantis promptly prohibited all visitation to LTCs, and the Florida Department of Health participated with the Agency for Health Care Administration for regular conference calls.[32] Orders

28. *Preventing and Managing COVID-19 Across Long-Term Care Services: Policy Brief, 24 July 2020*, WORLD HEALTH ORG. 2 (July 24, 2020), https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy_Brief-Long-term_Care-2020.1.

29. Werner, Hoffman, & Coe, *supra* note 10.

30. *Id*.

31. *See* Suzy Khimm, *America Knows that Nursing Homes are Broken: Does Anyone Care Enough to Fix Them?*, NBC NEWS, (Mar. 7, 2021), https://www.nbcnews.com/politics/politics-news/america-now-knows-nursing-homes-are-broken-does-anyone-care-n1259766.

32. Florida Division of Emerg. Management Order No. 20-006 (2020). *The State of Florida Issues Updates on COVID-19*, FLA. HEALTH (Mar. 15, 2020), http://www.floridahealth.gov/newsroom/2020/03/031520-2110-covid19.pr.html.

restricting visitation to nursing homes raise an interesting question because aside from the Constitution, the Nursing Home Reform Act regulates residents' rights.[33] The Nursing Home Reform Act states that facilities must permit a resident's immediate family to visit so long as the resident consents to visitation.[34] However, this right to visitation is subject to "reasonable clinical and safety" regulations.[35] Accordingly, states have authority to regulate LTC residents' safety,[36] including restricting visitation to protect the vulnerable elderly.[37]

So while residents have the right to visitation, the nursing home must implement reasonable measures to protect them from harm and preventable injury—mitigating the spread of COVID-19 certainly falls into that category.[38] In fact, LTC management had to use extra caution to prevent tort liability, because "[n]umerous class action and individual wrongful death lawsuits [were] filed asserting that proper precautions," such as limiting visitation, "were not maintained to keep nursing homes residents safe from contracting COVID-19."[39] Tort actions against nursing homes generally fall into a category known as elder abuse and include: neglect, physical abuse, exploitation, sexual abuse, emotional abuse, and abandonment.[40] Pre-pandemic, around two million elder abuse cases were reported yearly, with 10% of elders expected to

33. 42 U.S.C. § 1395i-3(c)(1)(A) (2014). "The basic objective of the Nursing Home Reform Act is to ensure that residents of nursing homes receive quality care that will result in their achieving or maintaining their 'highest practicable' physical, mental, and psychosocial well-being." Martin Klauber, *The 1987 Nursing Home Reform Act*, AM. ASS'N OF RETIRED PERS. (Feb. 2001), https://www.aarp.org/home-garden/livable-communities/info2001/the_1987_nursing_home_reform_act.html.

34. 42 U.S.C. § 1395i-3(c)(3)(B).

35. 42 C.F.R. § 483.10(f)(4)(iii) (2017).

36. 42 U.S.C. § 1395i-3(d)(4)(B).

37. *See Frequently Asked Questions (FAQs) on Nursing Home Visitation*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Oct. 6, 2020), https://www.cms.gov/files/document/covid-visitation-nursing-home-residents.pdf [https://web.archive.org/web/20201007160544/https://www.cms.gov/files/document/covid-visitation-nursing-home-residents.pdf]. The CMS revised its guidance suggesting that states should reallow visitation in each facility assuming the following conditions are met: no new cases for at least 28 days, no staff shortages, adequate PPE supplies, adequate cleaning supplies, adequate access to testing, and referral hospitals have open bed capacity on wards and intensive care units. *Id*.

38. *Why is the Nursing Home Restricting My Visit?*, SENIOR JUST. L. FIRM (Mar. 13, 2020), https://seniorjustice.com/why-is-the-nursing-home-restricting-my-visit/. [hereinafter SENIOR JUST. L. FIRM]

39. Daniel Pollack & Elisa Reiter, *The Effect of COVID-19 on Nursing Home Abuse: A Legal Perspective*, TEX. LAW. (Dec. 16, 2020, 6:44 PM), https://plus.lexis.com/api/permalink/09fdb179-a4bf-444f-ac50-cc098f9175fb/?context=1530671.

40. *What is Elder Abuse?*, NAT'L COUNCIL ON AGING, https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ (last visited Aug. 28, 2021). Elder abuse "[p]erpetrators include children, other family members, and spouses—as well as staff at nursing homes, assisted living, and other facilities." *Id.*

experience some form of abuse;[41] during the pandemic, elder abuse cases, which include cases alleging facilities mishandled COVID-19, have surpassed normal levels.[42] Thus, while normal circumstances would likely bar LTC management and state executives from restricting nursing home visitation, COVID-19 visitation restrictions are legal and necessary to slow the spread of the coronavirus.[43]

However, many lawsuits have challenged these executive orders by questioning their constitutionality.[44] When holistically looking at COVID-driven executive orders, the issue becomes whether the executive constitutionally issued the order via public health powers. To illustrate the process of determining whether an order passes constitutional muster, consider the following constitutional analysis of lockdowns.

With statewide lockdowns, substantive due process would apply because the orders would affect the entire jurisdiction,[45] such as all persons in Florida. To perform the substantive due process analysis, there are two preliminary questions to ask.[46] First, what did the state do?[47] Second, what is the right being infringed?[48] These questions answer whether the state's exercise of power infringes on a constitutional right.[49] Courts must determine whether the right is

41. The Meyer L. Firm, P.C., *Nursing Home Abuse Statistics*, NURSING HOME ABUSE GUIDE, http://www.nursinghomeabuseguide.org/nursing-home-abuse-statistics/ (last visited Aug. 28, 2021). "The Centers for Disease Control and Prevention defines elder abuse as an intentional act or failure to act by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a risk of harm to an older adult." S. Duke Han & Laura Mosqueda, *Elder Abuse in the COVID-19 Era*, 29 J. AM. GERIATRICS SOC'Y 1386, 1386 (2020). "Abuse of older adults can be physical, emotional, financial, neglect, or any combination of these." *Id*.

42. *Id*. One nursing home in Massachusetts acted so egregiously that the attorney general criminally charged administrators at a veteran's nursing home because COVID-19 killed seventy-six residents. Y. Peter Kang, *Mass. Nursing Home COVID-19 Criminal Case Stuns Attys*, LAW 360 (Oct. 2, 2020, 8:53 PM), https://www.law360.com/articles/1315475/mass-nursing-home-covid-19-criminal-case-stuns-attys. This was the country's first criminal case "against nursing home operators related to the pandemic, [because] the nursing home administrators contributed to the deaths of dozens of World War II and Vietnam War veterans." *Id*. Among the charges were severe staffing deficiencies, consolidating COVID positive residents with other residents, and making a multitude of "utterly baffling decisions . . . that caused a catastrophe." *Id*. (internal quotation marks omitted) (quoting MARK W. PEARLSTEIN, THE COVID-19 OUTBREAK AT THE SOLDIERS' HOME IN HOLYOKE 7, 11 (2020)). Note, however, some have criticized these charges as politically motivated. *Id.*

43. SENIOR JUST. L. FIRM, *supra* note 38.

44. *See* Adam Freedman, *An Uphill Legal Battle Against Lockdowns*, CITY J. (May 28, 2020), https://www.city-journal.org/legal-challenges-state-lockdown-orders.

45. *See* BARRON & DIENES, *supra* note 15, at 245 (noting that the due process clause of the 14th amendment Incorporates the Bill of Rights to the states).

46. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 530–34 (1925).

47. *See, e.g.*, *id.* at 530.

48. *See, e.g.*, *id.* at 534.

49. *See, e.g.*, *id.* at 535.

fundamental or non-fundamental.[50] Liberty interests, such as the right to refuse unwanted medical treatment and the right to assemble, are fundamental.[51] Economic rights, such as the right to contract or run a business, are non-fundamental.[52] The courts subject fundamental rights to the strict scrutiny test—there is a compelling government interest, and the act is narrowly tailored to achieve that government interest.[53] In the alternative, courts subject non-fundamental rights to the rational basis test—there is a legitimate government interest, and the act is rationally related to that interest.[54] Applying this test to lockdowns of public places, such as businesses, would implicate an economic right and trigger the rational basis test: the state would have a legitimate interest in keeping citizens safe from COVID-19, and closing places like businesses, where patrons transmit the virus to one another, is rationally related to that interest.

However, while most executive orders, such as lockdowns and business closures, apply to all citizens, regulation of a nursing home only applies to a limited group of people—elders. If the law treats a class of persons differently than another class of persons, the issue becomes one of equal protection.[55] As with substantive due process questions, the court must review the substance of the law.[56] The courts review suspect classes, such as race, with strict scrutiny, but they review non-suspect classes, such as age, using the less stringent rational basis test.[57]

Since a majority of LTC residents are over the age of sixty-five, by nature, the orders are discriminatory based on age.[58] Thus, these orders are subject to the highly deferential rational basis review. The government holds an interest in protecting the vulnerable and elderly nursing home residents against a disease known to be extremely

50. BARRON & DIENES, *supra* note 15, at 251.
51. *Id.* at 268–71.
52. *Id.* at 267.
53. *Id.* at 266–67.
54. *Id.* at 250–51. Note that if an order fails the rational basis test, it will also fail strict scrutiny. *Id.* at 266–67.
55. *Id.* at 340.
56. *Id.* at 340–42.
57. *Id.* at 339–40.
58. "[T]oday's nursing homes are highly regulated and high-quality, sophisticated institutions for the care and treatment of older adults who have severe physical health concerns and/or mental disabilities." *Nursing Homes*, HEALTH IN AGING, https://www.healthinaging.org/age-friendly-healthcare-you/care-settings/nursing-homes (last updated Oct. 2020). While there are sometimes residents under sixty-five years old, the majority are over sixty-five and nearly half of nursing home residents are over 85 years of age. *Id*. Reasons for admittance to a nursing home vary, but residents generally have a physical or mental condition that prevents them from taking care of themselves, and they need a specialized treatment plan to maintain the highest practicable mental and physical well-being. *Id*.

dangerous to elders,[59] and restricting visitors and sick individuals from entering the nursing homes is rationally related to that purpose because it keeps the disease away. Arguably, these orders would even pass strict scrutiny, as the compelling interest is preventing widespread deaths, and the orders are narrowly tailored to meet that interest because the executives directly follow expert guidelines issued by the Centers for Medicare & Medicaid Services ("CMS"). The CMS suggested that facilities restrict visitation by only allowing visitors in isolated settings during exceptional circumstances, limiting communal dining, screening staff for symptoms before entering, testing staff when possible, and limiting the number of staff that work in multiple facilities to prevent cross-transmission of the virus.[60]

While limiting visitors is reasonable due to the disproportionately high negative effects of COVID-19 on elders, it does not take into account another grave risk: isolation.[61] As the pandemic progressed, states relaxed visitation restrictions because there was more information on COVID-19 and how to mitigate it.[62] This policy move came just in time because a study on elders found that LTC residents are at least twice as likely as their community dwelling counterparts to experience loneliness.[63] In LTCs, there are three dimensions of loneliness: personal loneliness (no spouse, family, or pets); absence of a sympathy group (15 to 50 people such as a card game group or bingo group); and lack of a network group (150 to 1500 people such as a church family or rotary club group).[64] Since the LTCs must limit visits and keep residents apart, elders struggled with increased loneliness throughout the lockdowns

59. Roy, *supra* note 4.

60. *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Mar. 13, 2020), https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf.

61. Bethany Brown, *US Nursing Home Visitor Ban Isolates Seniors*, HUM. RTS. WATCH (Mar. 20, 2020, 10:08 AM EDT), https://www.hrw.org/news/2020/03/20/us-nursing-home-visitor-ban-isolates-seniors.

62. Cindy K. Goodman, *Nursing Home Visits Can Resume — but Many Turn Away Families Because They Are Not Ready*, S. FLA. SUN SENTINEL (Sept. 2, 2020, 8:08 PM), https://www.sun-sentinel.com/coronavirus/fl-ne-nursing-home-visits-resume-chaos-erupts-20200903-oubqnfe4xbhzrh3nm4cyhhft6m-story.html.

63. Christina R. Victor, *Loneliness in Care Homes: A Neglected Area of Research?*, FUTURE MED. (Dec. 14, 2020), https://www.futuremedicine.com/doi/10.2217/ahe.12.65 (finding that the community care population experiences loneliness at a 10% rate, while the long term care population experiences loneliness at a 22–42% rate). People suffering from loneliness are at increased risk for many ailments including depression, alcoholism, anxiety, cognitive decline, progression of Alzheimer's disease, obesity, and even mortality. Joyce Simard & Ladislav Volicer, *Loneliness and Isolation in Long-Term Care and the COVID-19 Pandemic*, 21 J. POST-ACUTE & LONG-TERM CARE MED. 966, 966 (2020).

64. Simard & Volicer, *supra* note 63, at 966.

because of the significant decrease in interaction with their three support groups.[65]

Because it is crucial to balance resident safety with preventing resident isolation, executives had to consider alternative ways of keeping residents engaged when issuing orders and guidance.[66] But leaving nursing homes without any guidance would likely be catastrophic, so state governments and industry experts had to get creative in order to provide nursing homes with practical alternatives. For example, *The Journal of Post-Acute and Long-Term Care* published a study that outlines some of these practical methods to safely alleviate isolation.[67] First, the facility could give all residents and staff easy-to-read nametags, so an aspect of personality can be reintroduced.[68] Next, families could purchase tablets, smartphones, or laptops for the resident and regularly communicate with them via phone call or teleconferencing.[69] Third, family members could alternate calling the resident multiple times per day to tell them good morning, good afternoon, etc.[70] Fourth, the family could try personalized contact such as visits through the resident's room window, handwritten cards, and artwork from grandchildren.[71] Finally, staff should find out the resident's religion and make it possible for them to view events and church services via the television or iPad.[72]

However, no true replacement exists for in-person contact, so in September 2020, the CMS eventually began to cite nursing homes that restricted visitors without a reasonable health or safety reason.[73] In March 2021, as the pandemic waned and many people were vaccinated,

65. *Id.*
66. *Id.*
67. *See id.* at 966–67.
68. *Id.* at 966.
69. *Id.* at 966–67.
70. *Id.* at 967.
71. *Id.*
72. *Id.*
73. Chelsea Cirruzzo, *CMS to Cite Nursing Homes Refusing Visits, Beneficiary Advocates Agree*, INSIDE WASH. PUBLISHERS (Sept. 30, 2020), https://plus.lexis.com/api/permalink/14d57ff6-cccd-4375-bc8c-d4e4fe59d9a2/?context=1530671 [hereinafter Cirruzzo I]. CMS primarily has revised its guidance on nursing homes and is urging both indoor and outdoor visits because isolation is taking an emotional toll on residents. Chelsea Cirruzzo, *CMS Revises Nursing Home Guidance to Allow Indoor, Outdoor Visits*, INSIDE WASH. PUBLISHERS (Sept. 23, 2020), https://plus.lexis.com/api/permalink/eae8fc37-dc29-4d96-9abe-b8a3e1accf45/?context=1530671 [hereinafter Cirruzzo II]. "The new guidance closely follows an independent nursing home commission report that said limiting visitation during the pandemic can mitigate the spread of COVID-19, but can also have detrimental consequences for residents who face loneliness and social isolation." *Id.* According to the commission, the continued use of virtual means of visitation, such as teleconferencing, is insufficient to meet residents' emotional needs. *Id.*

the CMS again revised its guidance.[74] The CMS stated that while it preferred outdoor visits, indoor visits should fully resume, regardless of vaccination status.[75]

Nevertheless, to understand the pressure put on governors to make decisions in the best interest of their citizens, it is helpful to keep in mind that the governors had to react, and they had to react quickly. The perfect reaction did not exist under those circumstances. When President Trump declared a national emergency on March 13, 2020, governors were required to promptly take action as the COVID-19 threat grew.[76] In Florida, Governor DeSantis immediately used his executive power, putting the most focus on vulnerable LTCs.[77] On March 15, 2020, visitations to LTCs were almost completely restricted, and residents were discouraged from leaving the facilities. Indeed, LTCs permitted returning residents and select visitors to enter only if stringent testing and screening criteria were met prior to entry .[78] Additionally, DeSantis designated COVID specific LTCs, barred COVID positive patients from reentering their original LTC, opened transitional LTCs to house recovering patients, and reallocated health workers as needed.[79] Eventually, the Governor relaxed the rules restricting limitation because of the extreme emotional toll that isolation was taking on LTC residents.[80]

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74. Maya Goldman, *CMS: Nursing Homes Should Allow Indoor Visits, but Outdoor Preferred*, INSIDE WASH. PUBLISHERS (Mar. 17, 2021), https://plus.lexis.com/api/permalink/588cb900-e5ec-4654-ae48-cf64e6082c9e/?context=1530671.

75. *Id.* However, visitation for unvaccinated residents should pause if the "county's positivity rate is greater than 10% and less than 70% of the nursing home's residents are fully vaccinated, and for residents, both vaccinated and unvaccinated." *Id.* Additionally, the guidance "encourages nursing homes in medium- or high-positivity counties to test visitors and urges visitors to get the vaccine when possible." *Id.*

76. AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020.

77. *Emergency Order Visitation Limits at Residential, Skilled Nursing and Long-term Care Facilities*, AGENCY FOR HEALTH CARE ADMIN. (Mar. 16, 2020), https://ahca.myflorida.com/docs/Emergency_Order_Visitation_Limits_at_Residential_Skilled_Nursing_and_Long-term_Care_Facilities.pdf.

78. *Id.*

79. Renzo Downey, *Gov. DeSantis Touts Florida's Elder Response as Country's Best*, FLA. POL. (July 7, 2020), https://floridapolitics.com/archives/347019-ron-desantis-nursing-homes. Compared to the decisions made by Governor Cuomo and Governor Newsome, this order was crucial in protecting Florida nursing homes because they were not forced to take on more than they could handle. Barbara F. Ostrov, *Will California Nursing Homes be Forced to Accept COVID-19 Patients?*, CAL MATTERS, https://calmatters.org/health/2020/04/nursing-homes-california-covid-19-patients-coronavirus-newsom/ (last updated Apr. 18, 2020) (noting that California nursing homes lacked adequate resources to readmit COVID-19 patients and requested that Governor Newsome rescind his order); Letitia James, *Nursing Home Response to COVID-19 Pandemic*, N.Y. STATE OFF. OF THE ATT'Y GEN. 6, https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf (revised Jan. 30, 2021) (finding that Governor Cuomo's readmittance order did result in increased nursing home deaths).

80. Cirruzzo I, *supra* note 73.

In early fall of 2020, DeSantis laid out plans to resume nursing home visits by: adding "emotional support" as an essential caregiver category, removing mandatory testing of those considered essential caregivers, and mandating PPE for visitors.[81] This order expanded access to residents because "[b]efore the inclusion of emotional support, only caregivers who fed, bathed or clothed residents could be considered 'essential' under the proposal."[82] "[There were] a lot of people in our nursing homes and assisted living facilities who [were] suffering from significant depression," so nursing home management had to make residents' mental well-being a top priority.[83] However, reopening the LTCs presented a grave dilemma: allowing increased visitation by emotional caregivers to mitigate isolation would put the facilities at risk of an infection spike due to the increased traffic.[84] Unfortunately, the case rate in Florida nursing homes did steadily increase in the final months of 2020, due to the more lenient—albeit necessary—visitation restrictions.[85] Luckily, however, the decision did not lead to a large spike, and vaccinations came just in time; by mid-January, most of Florida nursing homes had received COVID vaccinations.[86]

Likewise, Texas Governor Greg Abbott implemented a similar elder-targeted response, including a testing force that systematically "fanned" out to test a large number of staffers and residents.[87] Abbott prevented families from visiting LTCs from March to August 2020, required staff to work at one facility rather than working across multiple facilities, required PPE to be worn at all times in the facilities, and mandated COVID-19 screening procedures.[88]

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81. Christine Sexton, *DeSantis Gets Blueprint for Resumption of Nursing Home Visits*, DAILY BUS. REV. (Aug. 27, 2020, 1:28 PM), https://www.law.com/dailybusinessreview/2020/08/27/desantis-gets-blueprint-for-resumption-of-nursing-home-visits/.

82. *Id.*

83. *Id.*

84. Christine Sexton, *AARP Points to Higher Nursing Home Death Rate in Florida*, WUSF PUB. MEDIA (Oct. 16, 2020, 11:49 AM EDT), https://wusfnews.wusf.usf. edu/health-news-florida/2020-10-15/aarp-points-to-higher-nursing-home-death-rate-in-florida. According to DeSantis, though the decision would increase cases of COVID-19, "the need for visitation could no longer be ignored." *Id.*

85. Bailey LeFever, *Tampa Bay Nursing Homes Have All Offered Corona Virus Vaccines to Residents and Staff*, TAMPA BAY TIMES (Jan. 16, 2021), https://www.tampabay.com/news/health/2021/01/16/tampa-bay-nursing-homes-have-all-offered-coronavirus-vaccines-to-residents-and-staff/.

86. *Id*.

87. John Burnett, *Texas Calls in a Strike Force to Try to Slow Coronavirus Spread in Nursing Homes*, NAT'L PUB. RADIO (June 15, 2020, 5:06 AM EST), https://www.npr.org/2020/06/15/875392871/texas-calls-in-a-strike-force-to-try-to-slow-coronavirus-spread-in-nursing-home.

88. *See* Tessa Weinberg, *Texas Will Allow Limited Visits at Nursing Homes with No Active COVID Cases*, FORT WORTH STAR TELEGRAM (Aug. 6, 2020), https://www.star-telegram.com/news/

In contrast, California and New York's governors took differing responses to preserve hospital beds and ordered nursing homes to admit and readmit residents with confirmed or suspected COVID-19 cases.[89] California Governor Gavin Newsom required nursing homes to readmit patients who were recovering from COVID-19 to free up hospital beds.[90] This decision was short-lived because "[a]fter an outcry from the nursing home industry, the controversial requirement was loosened so that nursing homes may refuse to accept these patients if the facilities lack adequate protective gear for workers or other ways to prevent transmission."[91] Newsom also issued orders that limited visitors, provided support to the facilities, helped with testing, and allocated PPE to the facilities.[92]

Similarly, New York Governor Andrew Cuomo received heavy criticism for his March 25, 2020, directive[93] that required nursing homes with vulnerable populations to accept COVID-19-positive patients.[94] Though a state report introduced an alternative explanation for the high death rates in nursing homes—that the spread was due to nursing home staff—Cuomo ultimately amended the order to require residents to test negative for COVID-19 before readmittance.[95]

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coronavirus/article244780777.html. The requirement that staff stick to one facility is a big deal because asymptomatic, COVID-positive staff members could unknowingly spread the virus to every facility that they enter, so limiting staff to one facility minimizes that risk and also helps with contact tracing. Thomas W. Hess & Sydney N. Pahren, *Coronavirus (COVID-19) Infection Control in Nursing Homes*, DINSMORE (Mar. 16, 2020), https://www.dinsmore.com/publications/coronavirus-covid-19-infection-control-in-nursing-homes/.

89. Jack Dolan, *California Orders Skilled Nursing Facilities to Accept Coronavirus Patients*, L.A. TIMES (Apr. 1, 2020, 4:44 PM PT), https://www.latimes.com/california/story/2020-04-01/california-orders-skilled-nursing-facilities-to-accept-coronavirus-patients; Jake Lahut, *NY Gov. Cuomo Reportedly Ordered over 4,300 Recovering COVID-19 Patients to Be Sent to Nursing Homes*, BUS. INSIDER (May 22, 2020, 11:13 AM), https://www.businessinsider.com/cuomo-executive-order-4300-recovering-coronavirus-patients-ny-nursing-homes-2020-5.

90. Ostrov, *supra* note 79.

91. *Id.*

92. Office of Governor Gavin Newsome, *Governor Newsom Outlines Steps to Protect Residents and Employees of California Nursing Home & Residential Care Facilities*, CALIFORNIA (Apr. 10, 2020), https://www.gov.ca.gov/2020/04/10/governor-newsom-outlines-steps-to-protect-residents-and-employees-of-california-nursing-home-residential-care-facilities/.

93. *Advisory: Hospital Discharges and Admissions to Nursing Homes*, N.Y. DEPT. OF HEALTH (Mar. 25, 2020), http://web.archive.org/web/20200407103413/https:/coronavirus.health.ny.gov/system/files/documents/2020/03/doh_covid19-_nhadmissionsreadmissions_-032520.pdf.

94. *See* Luis Ferré-Sadurní & Amy Julia Harris, *Does Cuomo Share Blame for 6,200 Virus Deaths in N.Y. Nursing Homes?*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/nyregion/nursing-homes-deaths-coronavirus.html (last updated Jan. 28, 2021).

95. *Id.* In January 2021, the New York State Office of the Attorney General Letitia James found that this order did expose residents to an increased risk of harm and "some facilities may have obscured the data available to assess that risk." James, *supra* note 79, at 6.

Even in hindsight, experts have not reached a consensus on whether the lockdowns were beneficial.[96] Experts who are proponents of lockdowns maintain "that without any interventions, such as lockdown and school closures, there could have been many more deaths from COVID-19."[97] Other experts contend that lockdowns did not help, basing their conclusion on a hindsight study that compared COVID-19 cases in laissez-faire countries to countries with mandatory lockdowns.[98] Those researchers were not able "to find an additional benefit of stay-at-home orders and business closures," while noting that it is difficult to make cross-country comparisons because "nations may have different rules, cultures, and relationships between their government and citizenry."[99] Some scholars have even hypothesized that macro-level lockdowns fueled, rather than mitigated, the high death count in elders, further bolstering the argument that executive response was not the ideal method to protect LTCs.[100] Because viruses such as the flu and COVID-19 can be spread via invisible airborne particles, it is nearly impossible to pinpoint exactly how the virus is spreading.[101] This suggests that rushing elders who display COVID-like symptoms to the hospital actually helped to achieve the very thing it was trying to

96. Natalie Colarossi, *COVID Lockdowns May Have No Clear Benefit vs Other Voluntary Measures, International Study Shows*, NEWSWEEK (Jan. 14, 2021, 11:41 AM EDT), https://www.newsweek.com/covid-lockdowns-have-no-clear-benefit-vs-other-voluntary-measures-international-study-shows-1561656. This follows the trend of the policy makers who have failed to reach an agreement. *Id.* (noting that Republican governors DeSantis of Florida and Tate Reeves of Mississippi "vehemently opposed" lockdowns while Democratic governors Newsome of California and Cuomo of New York have consistently been pro lockdown).

97. *Id.*

98. *Id.* The study took a hindsight approach that analyzed whether more restrictive or less restrictive measures impacted individual behavior and slowed the spread. *Id.* It compared cases in England, France, Germany, Iran, Italy, Netherlands, Spain, and the U.S.—all countries that implemented mandatory lockdown orders and business closures—to South Korea and Sweden, which instituted less severe, voluntary responses. *Id.*

99. *Id.*

100. ALEX BERENSON, UNREPORTED TRUTHS ABOUT COVID-19 AND LOCKDOWNS, PART 2: UPDATE AND EXAMINATION OF LOCKDOWNS AS A STRATEGY 29–35 (1st ed. 2020). Because serious lockdowns induce a spike of panic in the population, the "panic itself drives vulnerable people [, who don't actually have COVID-19,] to hospitals," thus they are put at risk for cross transmission when they enter hospitals with those who are sick from the COVID-19 virus. *Id*. In early March 2020, Northern Italian physicians warned "that hospitals might be the main COVID-19 carriers because they are rapidly populated by infected patients, facilitating transmission to uninfected patients." Mirco Nacoti et al, *At the Epicenter of the COVID-19 Pandemic and Humanitarian Crises in Italy: Changing Perspectives on Preparation and Mitigation*, NEW ENG. J. MED. CATALYST 4 (Mar. 21, 2020), https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080. These physicians explain that while COVID-19 is not "particularly lethal," it is extremely contagious; "[t]he more medicalized and centralized the society, the more widespread the virus." *Id.* at 3–4. As such, "ambulances and personnel rapidly [became] vectors" of virus transmission. *Id*. at 3.

101. Nazar Raoof, *Is COVID-19 Airborne?*, HACKENSACK MERIDIAN HEALTH 1 (Nov. 4, 2020), https://www.hackensackmeridianhealth.org/HealthU/2020/11/04/is-covid-19-airborne/.

prevent: the spread of the virus to the vulnerable.[102] Scientists suggested that the disaster could have been averted through a "massive deployment of outreach services," such as mobile clinics or home care, which would have helped to minimize unnecessary movements, contact, and transmission of the virus.[103]

Moreover, the focus on massive lockdowns and macro countermeasures shifted the focus away from the most vulnerable of the population: nursing homes.[104] This was particularly evident in the Lombardy region of Italy because "[w]hile the regional government was focused on building the field hospital and scrambling to find ICU beds, its testing capacity lagged and Lombardy's nursing homes were in many ways left to fend for themselves."[105] New York faced a similar scenario when Governor Cuomo required nursing homes to readmit stable, recovering COVID-19 patients in order to maintain hospital capacity for the masses because the nursing homes lacked the necessary facility space and staff to keep the still COVID-positive patients isolated from the healthy residents.[106] Hindsight proved this decision erroneous because, while nursing home outbreaks and deaths spiked,[107] hospitals and emergency treatment facilities in New York never reached the risk of becoming overrun.[108] In a more egregious scenario, staff at a Spanish nursing home panicked due to the lockdowns and completely fled the facility, which ultimately left residents without any care at all.[109] As discussed later in this Article,[110] this is troubling considering the best and most effective method of ensuring patients receive an acceptable

102. *See* Nacoti, *supra* note 101. Basically, people who did not have COVID-19 but had COVID-like symptoms contracted COVID-19 because they went to the hospital; it was unlikely that they would have contracted it at that time if they had just stayed home. *See id*.

103. *Id.*

104. Nicole Winfield, *Perfect Storm: Lombardy's Virus Disaster is Lesson for World*, MED. EXPRESS (Apr. 26, 2020), https://medicalxpress.com/news/2020-04-storm-lombardy-virus-disaster-lesson.html.

105. *Id.*

106. Ferré-Sadurní & Harris, *supra* note 94.

107. *Id.*

108. Rebecca Hersher, *New York's Temporary Overflow Hospitals Remain Underused Despite COVID-19 Crisis*, NPR BROADCAST, at 00:10–00:24 (Apr. 7, 2020, 4:06 PM ET) (transcript and audio at https://www.npr.org/2020/04/07/829091975/new-yorks-temporary-overflow-hospitals-remain-underused-despite-covid-19-crisis).

109. Lucia Benavides, *Spanish Military Finds Dead Bodies and Seniors 'Completely Abandoned' in Care Homes*, NPR (Mar. 24, 2020, 1:08 PM EDT), https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820711855/spanish-military-finds-dead-bodies-and-seniors-completely-abandoned-in-care-home. "The Spanish military has found older residents of some care homes 'completely abandoned' and even 'dead in their beds,' Defense Minister Margarita Robles said in a television interview on Monday." *Id*. Soldiers discovered this tragedy as they "disinfected and provided emergency health care services this week to residential homes across the country." *Id*.

110. *See infra* pt. IV.

standard of care is by devoting more staff time to each resident—a metric known as staff-to-patient ratio.[111]

Despite the varied types of orders, especially related to nursing homes' readmittance of those recovering from COVID-19 and the various theories regarding the effectiveness of lockdowns, one statistic remained consistent—the coronavirus is extremely dangerous to American elders.[112] This introduces an entirely different explanation: the emergency response would always be insufficient because the LTC industry was unprepared and ill-equipped to handle a pandemic.[113] "Natural disasters have a disproportionate impact on the elderly," and the current top-down emergency response system "does not sufficiently address the vulnerable condition elderly individuals are left in after a natural disaster."[114]

III. SHORTCOMINGS OF LONG-TERM CARE FACILITIES IN BOTH QUALITY OF CARE AND EMERGENCY PREPAREDNESS

Unfortunately, LTCs and policymakers have wrestled with resident neglect for decades.[115] It has been a known problem since 1986, when a congressional study found "that residents of nursing homes were being abused, neglected, and given inadequate care."[116] The study ultimately led Congress to pass the Nursing Home Reform Act of 1987, which "require[d] the provision of certain services to each resident and establishe[d] a Residents' Bill of Rights."[117] Congress ultimately wanted "to ensure that residents of nursing homes receive quality care that will result in their achieving or maintaining their 'highest practicable' physical, mental, and psychosocial well-being."[118]

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111. Ina Jaffe, *Why Were Some Nursing Homes Spared the Devastation of COVID-19? Depends Who You Ask*, NPR BROADCAST, at 1:56–2:05 (June 26, 2020, 1:26 PM EDT) (transcript and audio at https://www.npr.org/2020/06/26/881935246 /why-were-some-nursing-homes-spared-the-devastation-of-covid-19-depends-who-you-a.). [hereinafter *Why Were Some Nursing Homes Spared the Devastation of COVID-19*].

112. *COVID-19 Nursing Home Data*, CNTRS. FOR MEDICARE & MEDICAID SERVS., https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg/ (last updated Oct. 11, 2020) (finding respective cases per 1,000 in California, Florida, New York, and Texas to be 656.17, 472.50, 428.21, and 664.08; also finding respective deaths per 1,000 in California, Florida, New York, and Texas to be 79.55, 79.55, 116.95, and 118.48).

113. Myles Maltz, *Caught in the Eye of the Storm: The Disproportionate Impact of Natural Disasters on the Elderly Population in the United States*, 27 ELDER L.J. 157, 157 (2019).

114. *Id*. In other words, executive responses to COVID-19 would be largely insufficient to protect elders in LTC's because disaster preparedness is the only way to keep them safe during a pandemic of this scale. *See id*.

115. Klauber, *supra* note 33; *See* 42 U.S.C. § 1395i-3 (2018).

116. Klauber, *supra* note 33.

117. *Id.*

118. *Id.*

Unfortunately for LTCs, natural disasters and pandemics expose the cracks in resident care quality, and it is easy to play Monday-morning quarterback and assert that the problems should have been foreseen.[119] "With the current crisis, we are reminded that long-term care facilities often suffer devastating consequences in states of emergency."[120] With this in mind, most state regulators require LTCs to have a plan in place for dealing with emergencies, as a safeguard and insurance policy on resident safety.[121]

In Florida, the Agency for Health Care Administration requires "[e]ach nursing home licensee [to] have a written plan with procedures to be followed in the event of an internal or externally caused disaster."[122] This rule points to Chapter 400 of the Florida Statutes, which includes requirements for an emergency plan in response to threats caused by natural disasters, like loss of power, but does not require a specific infection control contingency plan.[123] Despite these efforts, an independent audit facilitated by the U.S. Department of Health and Human Services found that Florida nursing homes were ill-prepared for emergencies like COVID-19, and this was largely attributable to ineffective state oversight; in other words, well intended laws were in place, but they were not effectively enforced or ultimately followed.[124] Of the twenty LTC facilities sampled and audited, the auditors found emergency plan faults in sixteen facilities, safety issues in nineteen facilities, and even more pervasive failures in a few facilities, such as inadequate emergency generators and too few evacuation sites.[125] Perhaps the most troubling finding was that Florida still awarded licenses to facilities that did not have county-approved emergency

119. Eden Darrell, Mary Novacheck & Jennifer Bullard, *Anticipating COVID-19 Legal Issues Nursing Homes May Face*, LAW 360 (May 7, 2020, 5:40 PM EDT), https://www.law360.com/articles/1269839/anticipating-covid-19-legal-issues-nursing-homes-may-face.

120. *Id.*

121. *See, e.g.*, FLA. ADMIN. CODE r. 59A-4.126 (2015).

122. *Id.* at (2)(a).

123. *See* FLA. STAT. § 400.23(2)(g) (2020) (requiring a minimum plan that addresses "emergency evacuation transportation; adequate sheltering arrangements; post disaster activities, including emergency power, food, and water; post disaster transportation; supplies; staffing; emergency equipment; individual identification of residents and transfer of records; and responding to family inquiries"). While the chapter specifically requires facilities to develop and implement policies and procedures to deal with infection control and nursing staff to regularly attend continuing education relating to infection control, it does not specifically require an emergency plan for a pandemic or a viral outbreak at the facility. *Id*. at §§ 400.506(8)(e), 400.998(3)(a).

124. Christopher O'Donnell, *Florida Nursing Homes Unprepared for Emergencies like the Coronavirus, Audit Finds*, TAMPA BAY TIMES (May 7, 2020), https://www.tampabay.com/news/health/2020/05/07/florida-nursing-homes-unprepared-for-emergencies-like-the-coronavirus-audit-finds/.

125. *Id.*

plans,[126] as required by the Agency for Healthcare Administration.[127] Unfortunately, this issue is not limited to Florida; "[f]ederal audits of nursing homes in New York, California, Texas and Missouri revealed a similar number of nursing home failures."[128]

The CMS gives each nursing home a one-to-five-star quality rating to assist consumers in selecting a facility; these scores are based on in-person inspection results, staff-to-patient ratio, and ultimate quality of care.[129] To determine the reliability of these ratings, *New York Times* researchers analyzed various data relating to over 10,000 nursing homes.[130] It appears that the CMS has done a poor job ensuring the accuracy of these ratings because "[o]f the more than 3,500 homes rated with five stars, over 2,400 were cited for problems with infection control or patient abuse."[131] The nursing homes abused the rating system by submitting information that made them sound cleaner and safer than reality; inflating staffing levels by incorrectly including administrative staff and employees on vacation; and falsifying data submitted to the CMS since that data is rarely audited.[132] Though the ratings are largely based on in-person inspections by health inspectors, the nursing homes typically knew in advance when the inspections were happening; thus, they could prepare and be on their best behavior. [133] As such, the facilities were more concerned with their ratings than anything else, and the shortfalls in the rating system were such that they allowed nursing homes "to score high grades without upgrading the care they provided."[134]

In some cases, the discrepancy between rating and reality was significant: half of all nursing homes significantly underreported deadly pressure sores, one Ohio five-star facility only disclosed eleven of forty-seven life-threatening falls, a New York facility admitted seventy-two

126. *Id.*
127. FLA. ADMIN. CODE r. 59A-4.126.
128. O'Donnell, *supra* note 124.
129. Jessica Silver-Greenberg & Robert Gebeloff, *Maggots, Rape and Yet Five Stars: How U.S Ratings of Nursing Homes Mislead the Public*, N.Y. TIMES (Mar. 13, 2021), https://www.nytimes.com/2021/03/13/business/nursing-homes-ratings-medicare-covid.html.
130. *Id.*
131. *See id.*
132. *Id.*
133. *Id.* "'They were working to improve their ratings, but not their quality,' said Charlene Harrington, who sits on a board that advises the CMS on the ratings system." *Id.* "[P]roblems with the five-star system left these homes less prepared in the pandemic." *Id.* Homes could manipulate the system and could get away with less staffing and infection control deficiencies, "so they had poorer quality than the public knew about, and they were in the worst position to manage Covid." *Id.*
134. *Id.*

fallen residents to hospitals but only reported fifteen.[135] One patient attended a five-star facility where she waited a week to be given her first bath, her wounds were not treated, her pain medication was not delivered on at least three days during the first month, and an infected wound went six days before she was given attention by the nursing home staff.[136] In more egregious cases at "five-star facilities," government health inspections revealed maggots on a resident's foot and an instance where a staff member raped a wheelchair-bound resident.[137] So, while the CMS relies on self-reported data from the facilities to create ratings, that data is largely unreliable because it is unaudited, unverified, and subject to manipulation by the facilities; this ultimately creates quality ratings that give consumers a false sense of assurance, security, and safety.[138]

Despite the shortfalls in emergency management and rating systems at LTCs, the LTC industry is pushing to eliminate tort liability based on mishandling of COVID-19.[139] Many states allow some form of tort immunity from ordinary negligence relating to COVID-19.[140] The American Bar Association cautions "that the industry will use the pandemic as cover to push for future immunity from liability for negligent care" because the industry has been pushing for decreased liability for a long time now—it appears that the industry is using this crisis to pursue that objective.[141]

Though COVID-19 certainly was an unforeseen crisis, a strong correlation exists between COVID-19 outbreaks and facilities that have a history of substandard care, citations for failures to follow applicable laws, and a lack of adequate procedures to control infections.[142] As such,

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135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. Palm Beach Post Ed. Bd., *Coronavirus Florida: Editorial: Don't Let Nursing Homes Escape Legal Liability*, PALM BEACH POST (May 7, 2020, 6:16 AM ET), https://www.palmbeachpost.com/opinion/20200517/coronavirus-florida-editorial-dont-let-nursing-homes-escape-legal-liability (stating nursing-home organizations are seeking immunity for earlier negligence claims; however, DeSantis and Florida's legislature refused). The article also notes "poor staffing and shoddy conditions allowed the virus to spread out of control in some of [New York's] nursing homes" and Florida should avoid that mistake. *Id.*
140. *See, e.g.*, Samuel Brooks, Robyn Grant & Michael F. Bonamarte, *States Move to Shield LTC Facilities from Civil Liability*, A.B.A. (July 23, 2020), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/vol-41--issue-no-6--july-august-2020-/states-move-to-shield-ltc-facilities-from-liability/. Note generally that the doctrine of negligence requires the nursing home to breach a duty to provide a reasonable standard of care owed to its residents, and the plaintiff must establish that the nursing home caused some sort of loss or damage. EDWARD J. KIONKA, TORTS IN A NUTSHELL 65 (7th ed. 2020).
141. Brooks, Grant & Bonamarte, *supra* note 140.
142. *Id.*

despite multiple decades of effort seeking to mitigate LTC risks, a multitude of legal issues exist relating to facilities and their compliance with applicable federal and state tort laws.[143]

However, blame does not rest solely on LTC policy and management. Despite efforts to both fund and improve the quality of care in nursing homes, facilities are still inherently prone to errors because of "[v]arious characteristics of the nursing home industry, its operation, and the population it serves."[144] When relatives decide to admit a family member to a nursing home, they are primarily concerned with the resident's physical safety.[145] As a result, nursing homes must carefully balance the residents' safety, medical needs, and quality of life because residents will often spend the remainder of their lives in the nursing home.[146] While quality of care and financial resources only have a slight degree of statistical correlation, many would still argue that underfunding nursing homes is the primary culprit of lower quality of care.[147] The ability to comply with emergency protocols requires sufficient funding, and the industry as a whole has struggled to balance the needs of regulation and oversight with the ability of the entities to receive funding.[148] Health-related funding already puts a financial strain on state and federal budgets,[149] and since an overwhelming number of elders cannot afford to pay for care at the current rates, raising rates paid by the residents lacks feasibility.[150]

Nevertheless, to help combat the plague of substandard care, the state legislatures and agencies can still utilize administrative power to create emergency protocols for nursing homes and set quality of care requirements, such as minimum staff-to-patient ratios, disaster plans,

143. *Id.*

144. Marshall B. Kapp, *Resident Safety and Medical Errors in Nursing Homes*, 24 J. LEGAL MED. 51, 52 (2003). Regulation and litigation culture in the United States has increased the barrier because "the regulatory and litigation climate [] acts as a major obstacle to essential efforts to encourage and facilitate the reporting and disclosure of errors concerning resident safety." *Id.* Residents are unable to regulate their own safety because "the substantial level of severe cognitive and/or emotional impairment among a large percentage of the nursing home population constrains the ability of many residents to take a meaningful role in the design and monitoring of their own care." *Id.* at 55. Inadequate staffing and high staff turnover create managerial dilemmas that lead to a substandard quality of care in many facilities. *Id.* at 56.

145. Marshall B. Kapp, *Safety in Nursing Homes*, 12 QUALITY SAFETY HEALTH CARE 201, 201 (2003).

146. *Id.* at 202.

147. *See id.* at 203.

148. Brendan Williams, *Failure to Thrive? Long-Term Care's Tenuous Long-Term Future*, 43 SETON HALL LEGIS. J. 285, 305 (2019).

149. *Id.*

150. REBECCA MORGAN ET AL., ELDER LAW IN CONTEXT 700 (2017). "The issues for [nursing home residents] include not only choosing a nursing home, but paying for the care and the quality of care." *Id.*

and equipment for emergencies.[151] For example, the Florida Agency for Health Care Administration has already taken steps to maximize resident safety.[152] After the Hurricane Irma disaster in 2017, they created a rule stipulating that all nursing homes must have an emergency power source sufficient to keep ambient temperatures below eighty degrees Fahrenheit for at least ninety-six hours.[153] Nursing homes—not common entities such as the power companies—owe their residents a duty of care during a power outage.[154] Nursing homes can reasonably protect residents from high ambient temperatures by maintaining an emergency backup power system such as a diesel-powered generator,[155] which would fulfill their duty to protect residents from the foreseeable power outages that could cause lethal temperatures in the facility.[156] Despite the importance of generators, the state has continually granted extensions to a large portion of nursing homes falling outside of compliance.[157] This is particularly troubling because Florida's assisted living facilities have shown that it is more than feasible to meet these requirements—the majority already have equipment that meets the new requirements.[158] This indicates that either the rules are inadequate to protect LTC residents, or the oversight that would ordinarily hold facilities accountable is deficient.

151. Fla. Ass'n of Homes & Servs. for the Aging, Inc. v. Agency for Health Care Admin., 252 So. 3d 313, 315 (Fla. Dist. Ct. App. 2018). "[Fla. Stat. §] 120.54(4)(a) provides an agency with the authority to adopt an emergency rule if it 'finds that an immediate danger to the public health, safety, or welfare requires emergency action,' and such rule is 'necessitated by the immediate danger.'" *Id.* In non-emergency situations, such as a minimum staff-to-patient ratio at all times, the agency must follow standard rule making procedures that preserve due process protections. *Id.*

152. *Id.* at 316. According to the agency's research, Florida's large percentage of nursing home residents will have health problems if exposed to high heat. *Id.* When Hurricane Irma caused a Hollywood, FL nursing home to lose power for an extended period of time, eight residents died. *Id.* Because the agency sufficiently laid out their reasoning for implementing the emergency rule, the court held that it complied with Florida statutes for emergency rule making. *Id.* at 317.

153. *Id.* at 318.

154. Rehab. Ctr. at Hollywood Hills, LLC v. Fla. Power & Light Co., 299 So. 3d 16, 20 (Fla. Dist. Ct. App. 2020).

155. *Fla. Ass'n of Homes & Servs. for the Aging*, 252 So. 3d at 317–18.

156. *Rehab. Ctr. at Hollywood Hills, LLC*, 299 So. 3d at 20.

157. Elizabeth Koh, *After Irma Deaths, 60% of Nursing Homes Still Don't Have 4 Days of Backup Power for AC*, MIA. HERALD, https://www.miamiherald.com/news/weather/hurricane/article234502422.html (last updated Aug. 30, 2019, 10:29 AM) (finding that Florida officials granted 58% of nursing homes an additional year to meet new requirements); O'Donnell, *supra* note 124.

158. Koh, *supra* note 157.

IV. HOW FLORIDA CAN LEARN FROM THE COVID-19 CRISIS

Obviously, for-profit entities cannot cut corners on care, so investors should resist the urge to use questionable management and accounting practices to funnel cash from the nursing home entity to their investment accounts.[159] Rather, they should reinvest adequate profits into the facilities to ensure that they are providing residents with a reasonably acceptable standard of care.[160]

Unsurprisingly, independent researchers across the country have found that the nursing homes with the most problems—and lowest ratings—before the pandemic fared the worst during the pandemic.[161] For example, Aperion Care, a large midwestern nursing home chain, consistently received low ratings for both staffing and overall care and had serious issues during the pandemic.[162] By contrast, "higher nurse staffing levels and higher quality ratings were associated with less COVID-19 cases and deaths," as found by Yue Li, a University of Rochester Medical Center researcher.[163] Li quantified this hypothesis and "found that every 20-minutes [per patient per day] increase in the RN staffing level was associated with a 22 percent reduction in COVID-19 cases."[164] Other researchers have found that a variety of external factors that are outside the LTCs' control, such as outbreaks amongst the

159. Ina Jaffe, *For-Profit Nursing Homes' Pleas for Government Money Brings Scrutiny*, NPR BROADCAST, at 00:10–00:22 (Oct. 22, 2020, 5:06 AM ET) (transcript and audio at https://www.npr.org/2020/10/22/918432908/for-profit-nursing-homes-pleas-for-government-money-brings-scrutiny) [hereinafter For-Profit Nursing Homes' Pleas]. For example, management can "cut staff to the bone" to maintain profitability. *Id.* However, as discussed earlier, adequate staffing is a key preventative measure for disasters such as pandemics. Kapp, *supra* note 144, at 56.

160. *See For-Profit Nursing Homes' Pleas*, *supra* note 159.

161. *Why Were Some Nursing Homes Spared the Devastation of COVID-19?*, *supra* note 111. Unfortunately, some research has shown that the CMS ratings are skewed and misleading because they are subject to manipulation by the facilities. Silver-Greenberg & Gebeloff, *supra* note 129.

162. *For-Profit Nursing Homes' Pleas*, *supra* note 159. The majority of Aperion run nursing homes received one out of a possible five stars from the CMS, with equally low staff to patient ratio ratings. *Id*. According to the Medicare tool, two stars is a below average rating, and this raises serious doubts about Aperion because rating is a primary indicator of safety. *Aperion Care West Ridge*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicare.gov/care-compare/details/nursing-home/145832?id=1da14dcd-509f-4b5a-aad3-533e05143a46&city=Chicago&state=IL&zipcode= (last visited Jan. 4, 2021); *Your Guide to Choosing a Nursing Home or Other Long-Term Services & Supports*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicare.gov/care-compare/en/assets/resources/nursing-home/02174-nursing-home-other-long-term-services.pdf (last visited Jan. 4, 2021) (listing "rating" as the first thing to consider when comparing the safety and care of a nursing home). NPR interviewed a nursing assistant who claimed that a floor with sixty-five residents was only allocated three to four staff members; however, six to seven staff members would be adequate to cover the needs of those patients. *See* For-Profit Nursing Homes' Pleas, *supra* note 159.

163. *See Why Were Some Nursing Homes Spared the Devastation of COVID-19?*, *supra* note 111.

164. *Id.*

community, affect the vulnerability of nursing homes, so the COVID-19 outbreak ravaged even the highest quality nursing homes.[165]

Nevertheless, it appears that nursing homes structured as not-for-profit entities ("NFPs") are generally higher quality than those nursing homes structured as for-profit entities ("FPs"). Throughout the last 20 years, scholars have performed empirical studies examining the correlation between nursing homes' focus on profit and substandard quality of care.[166] In a review of 50 nursing home studies, two researchers found that NFPs "have [consistently] been associated with a higher quality of services" when compared to FPs.[167] Moreover, NFPs have fared better than FPs when evaluating process-level "indicators, such as inappropriate use of restraints, audit deficiencies for restraint use, catheterization rate, tube feeding rate, and inappropriate usage of psychoactive drugs."[168]

Some data suggests that inadequate staffing is the likely culprit of substandard quality of care.[169] Researchers compared the staffing levels and quality deficiencies across the FPs and the NFPs and found that the FPs had lower levels of registered nurse staffing and overall lower staffing hours.[170] "In comparison to FP ownership, [the average] NFP was characterized by an estimate of 0.34 more hours per resident day for direct-care, as well as 0.23 more hours per resident-day for support staff."[171] Stockholders and lien holders pressure management to increase profits, which partly explains why FPs face this issue.[172] Accordingly, management will reduce staff hours because it is an expensive and controllable cost; decreasing costs will lead to increased profits, and that makes the stockholders happy.[173]

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165. *Id.* "If you happen to be a five-star facility in a community with lots of cases, it's likely to come into your building." *Id.* "If you're a one-star facility located in an area with very few cases, you're probably not going to have COVID enter your building." *Id*.

166. David P. Paul III et al., *Quality of Care and Profitability in Not-For Profit Versus For-Profit Nursing Homes*, BUS. & HEALTH ASS'N ANN. CONF. 90, 91 (2016). This study summarized and compiled the results of previous studies analyzing whether the status of the nursing home business entity as for-profit versus not-for-profit impacted the quality of care provided to residents. *Id.*

167. *Id.* at 92.

168. *Id.* at 93.

169. *Id.*

170. *Id.* "These chains were considered to have the sickest residents, however the combined total nursing hours were 30% lower than their NFP counterparts." *Id*. Additionally, "top ten" FP chains fell below the national average of licensed practical nurse staff levels, which resulted in "over 36% more quality deficiencies and 41% more severe deficiencies than NFP facilities." *Id*.

171. *Id*.

172. *Id*. at 94.

173. *Id*.

Likewise, the FPs often are organized such that there is a chain of homes spreading across a geographical area.[174] A chain or franchise structure brings something to the table that the smaller NFPs do not have—aggressive marketing campaigns and brand recognition.[175] They can make up for their substandard CMS ratings by launching marketing campaigns to recruit new residents.[176] "FP chain participating homes have been heavily debt-financed with stakeholder pressures for short-term profitability, and base managerial decisions on financial priority at the expense of care quality."[177] FPs control their costs by minimizing labor hours; this practice reduces staff hours and maximizes profit.[178] Fewer staff hours means lower quality of care, but the FP chains do not seem to mind because they can rely on their large team of attorneys and questionable arbitration clauses to fight claims and force disgruntled residents to settle.[179] From this analysis, it could be deduced that either regulators or FP management should require changing management and budgetary structures to more closely approximate that of an NFP, which generally have a better staff-to-patient ratio.[180]

While the nursing home industry argues that the government does not provide adequate Medicaid funding, this lack of public funds does not tell the whole story. And while the FP model is part of the problem, NFPs are also flawed because owners can still profit largely from the facilities without making the entities look profitable on paper.[181] Basically, the owners structure their business entities so that the facility operation is separate from the real estate to shield the company's assets

174. *Id*. at 93.

175. *Id*. at 94.

176. *See id*. at 93 (citing Amy E. Elliot, *An Analysis of Participation, Quality of Care and Efficiency Outcomes of an Inter-Organizational Network of Nursing Homes*, PROQUEST (2007), (Doctoral Dissertation, The Ohio State University).

177. Paul III et al., *supra* note 166; Martin Kitchener et al., *Shareholder Value and the Performance of a Large Nursing Home Chain*, 43 HEALTH SERV. RSCH., 1062, 1062–64, 1073–74 (2008).

178. Paul III et al, *supra* note 166, at 93.

179. *Id.* at 94. Arbitration agreements for LTCs are a hotly contested aspect of elder law because the parties—often elders with little financial resources—are required to pay upfront for the costs, the venue is typically inconvenient, the arbitration clauses are usually mandatory boilerplate, and the elders typically don't even realize or understand what they mean. MORGAN ET AL., *supra* note 150, at 618. As such, these arbitration clauses "are subject to much public policy controversy and have been subject to restrictive legislation in some states." *Id*. at 157. Many opponents of the clauses maintain that they are unfair because residents are forced to sign them before admission, and they are giving up the right to litigate these disputes in front of an independent tribunal. *Id.*

180. Paul III et al., *supra* note 166, at 93. NFPs prioritize quality of care, even if that hurts their bottom line. *Id*. at 92–93. "As a result, the quality of care that the NFP nursing homes offer, such as efficient staff levels to care for resident's needs, and proper medicine distribution, exceeds the additional resources FP nursing homes obtain and thus NFP residents are more likely to stay long-term in a nursing home." *Id.* at 94.

181. *See For-Profit Nursing Homes' Pleas*, *supra* note 159.

from liability, and the facility leases the property from the real estate entity.[182] Consequently, the owners still rake in rent money under the guise of a "necessary expense."[183]

However, it is still unclear whether the type of ownership structure makes a difference in COVID cases and deaths across facilities.[184] In a study of over 11,000 nursing homes across the United States, researchers from the American Medical Institute compared four types of nursing home entities—PEs, NFPs, FPs, and government-owned nursing homes—to determine how private equity-owned nursing homes ("PEs") have fared in the COVID-19 pandemic.[185] The researchers found PEs, NFPs, and FPs all had around thirty-five more cases per 1,000 than their government-owned counterparts.[186] All four types of structures still had generally similar rates of COVID-19 deaths.[187] Though this was the first study that introduced PEs to the mix, other studies analyzing the effect of ownership on COVID-19 spread in nursing homes yielded inconclusive results because the studies had inconsistent findings on whether the type of ownership created a more dangerous environment for residents.[188]

The first study found that facility location and size impacted the case rate more than quality rating and type of ownership did..[189] The next study found that staffing was the ultimate driver of vulnerability, rather than type of ownership.[190] In contrast, the third study found that nursing homes with a high percentage of Medicaid patients had almost

182. *Id.*

183. *Id.*

184. Robert Tyler Braun et al., *Comparative Performance of Private Equity-Owned US Nursing Homes During the COVID-19 Pandemic*, JAMA NETWORK 1, 7 (Oct. 28, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2772306.

185. *Id.* at 1. This was a cross-sectional study where the researchers compared various COVID-19 related factors across the following nursing home ownership structures: for-profit, not-for-profit, government owned, and private equity owned. *Id.* at 4.

186. *Id.* at 1. Note however, "[i]t is possible that differences in rates of testing among facilities may have obscured differences in COVID-19 cases and deaths, but this would not have affected estimates of deaths by any cause." *Id.* at 7.

187. *Id.* at 1.

188. *Id.* at 7. Researchers analyzed six different COVID-related studies on nursing home ownership structure. *Id.* at 7–8.

189. Hannah R. Abrams et al., *Characteristics of U.S. Nursing Homes with COVID-19 Cases*, 68 J. AM. GERIATRICS SOC'Y 1653, 1653 (2020).

190. Charlene Harrington et al., *Nurse Staffing and Coronavirus Infections in California Nursing Homes*, 21 POL'Y, POL., & NURSING PRAC. 174, 183 (2020). "We conclude that health professionals, hospitals, and health plans could identify nursing homes that are at risk for infections and other poor outcomes if they more frequently used publicly available information about nursing home staffing and the quality of care." *Id.* From an administrative law perspective, the best way to make LTCs safer is for states to "adopt stronger minimum staffing requirements, particularly to increase RN and total nurse staffing levels in all nursing homes." *Id.*

a 9% greater likelihood of six or more COVID-19 deaths.[191] Finally, the American Geriatrics Society produced a study that ties these findings together because it analyzes U.S. nursing homes generally rather than nursing homes of a particular state.[192] While it found that the biggest driver of COVID vulnerability is the level of outbreak in a geographic area, increasing nursing hours and nursing assistant hours are perhaps the best way of lowering the probability of an outbreak and deaths in a facility.[193] If a facility can implement an additional twenty minutes per day of RN staffing per patient, then a 22% reduction in COVID-19 cases would follow.[194]

In the wake of the pandemic, some states have already begun conducting investigations into what went wrong, and it will not be a surprise when others follow suit. In early 2021, the New York State Attorney General Letitia James released a report detailing the overall response of nursing homes to the pandemic.[195] The key findings were as follows: more residents died than reported by the Department of Health; facilities with lower pre-pandemic CMS ratings had higher fatality rates; insufficient PPE for staff put residents at risk; insufficient COVID-19 testing in the early stages increased transmission; New York's state reimbursement model gave FP owners a financial incentive to transfer funds to related parties rather than invest in higher levels of PPE and staffing; facilities did not follow the executive orders requiring family communion, subjecting residents to an unnecessarily high emotional toll; and Governor Cuomo's order requiring the readmission of recovering COVID-19 patients likely put other residents at risk.[196] The New York Attorney General recommended a number of actions moving forward including: enforcing existing state laws more thoroughly; maintaining a proper ratio of staff including registered nurses, certified nursing assistants, and licensed practical nurses; tailoring staff levels to average patient acuity; requiring a higher degree of financial transparency for FP nursing homes, especially regarding related party transactions; keeping staff trained properly on the latest infection control protocols, and eliminating recently enacted tort immunity,

191. Mark Unruh et al., *Nursing Home Characteristics Associated with COVID-19 Deaths in Connecticut, New Jersey, and New York*, 21 JAMDA 1001, 1002 (2020). The study analyzed nearly 1200 nursing homes in New York, New Jersey, and Connecticut. According to the JAMDA researchers, the finding of the JAMDA study indicates that FPs are more likely to have COVID outbreaks than NFPs. Braun et al., *supra* note 184, at 7.

192. Abrams et al., *supra* note 189, at 1653–54.

193. *Id.* at 1655–56

194. *Why Were Some Nursing Homes Spared the Devastation of COVID-19?*, *supra* note 111.

195. James, *supra* note 79, at 5.

196. *Id.* at 6.

forcing facilities to invest in adequate quality controls.[197] Moreover, the report recommended that the Department of Health could increase its staff "to ensure sufficient skilled resources for oversight, complaint assessment, surveys, inspections, and immediate responses to information requests from state agencies in support of health care and law enforcement efforts."[198]

Additionally, private institutions and studies have begun releasing next steps for LTCs; Florida's James Madison Institute released a policy brief that identifies a tremendous growth opportunity for Florida's nursing home industry.[199] Nursing homes are a highly regulated industry, yet almost all facilities get cited for CMS violations; this suggests that the regulations are not doing their intended job.[200] However, regulation of nursing homes is a catch twenty-two because the residents' high vulnerability levels makes it necessary, but "excessive requirements can impose unnecessary costs on care providers, distract from the core objectives of oversight agencies, and limit the potential for innovation."[201] Logically, "[r]egulation[s] should be . . . clear, concise and focused on preventing harm and abuse," but current regulations appear to work against the success of the industry; administrative agencies should focus on laws that the nursing homes can feasibly follow and hold LTCs accountable for not following the law.[202]

Moreover, agencies should ensure that the law actually achieves its intended purpose; for example, Florida's Certificate of Need Program ("CON") requires any healthcare provider to receive government approval to build facilities, expand facilities, or to materially change service offerings.[203] The CON was supposed to keep healthcare costs and unnecessary spending low by regulating competition and keeping occupancy rates in facilities at a set level.[204] However, the CON has had little effect on reducing Medicaid expenditures in nursing homes and LTCs.[205] Instead, the CON caused expenditures to increase in some cases, granted incumbent nursing home care providers undue market power, and erected barriers to entry for competing providers."[206] In other

197. *Id.* at 7–8.
198. *Id.* at 8.
199. Nastasi, *supra* note 7, at 1.
200. *Id.* at 2 (noting that in 2019, 95% of Florida nursing homes received one or more quality standards citation from the CMS).
201. *Id.* at 3.
202. *Id.*
203. *Id.*
204. *Id.* at 4.
205. *Id.* at 4–5.
206. *Id.* at 6.

words, incumbents have no market pressure to increase their quality, because they know that their occupancy will remain at a predetermined level so long as they meet the minimum quality standards—the bar is low and there is no incentive to raise it.[207] A redesign of the CON program is in order because of "significant distortionary impacts which benefit incumbent care providers to the detriment of [nursing home] consumers and potential competitors".[208]

Additionally, if the industry took steps to decrease the overall size of each facility to approximately 120 beds or less (thus increasing the number of total facilities in the long run), then quality would improve because "smaller facilities . . . [are] less likely to have quality of care and quality of life deficiencies."[209] The study goes even further by suggesting "the Green House [M]odel," where small homes of less than twelve residents provide care in a more home-like setting with the core values of quality care, "choice, dignity, respect, self-determination, and purposeful living."[210] Since there is never a one-size-fits-all approach to skilled nursing care, keeping the Green House Model in mind as Florida expands its nursing home industry could prove beneficial to overall quality.[211] Moreover, regulators need to keep in mind that regulations are costly to follow and only create minimum standards of care. "Regulations should [] be clear, concise, and limited to those that are necessary to ensure safety and prevent abuse" and should focus on holding providers accountable for outcomes, such as overall quality of care, rather than inputs, such as the steps each facility must follow.[212] In other words, a one-size-fits-all approach hinders innovation, and facilities should have the freedom to find out what works best for their patients, so long as they are getting the job done by maintaining an appropriate standard of care.[213] Facilities that take an innovative approach, such as the Green House Model, should not be more heavily scrutinized because they do not fit into traditional LTC norms.[214] Giving

207. *Id.* "[T]he evidence suggests that the CON laws are associated with lower quality and higher costs." *Id*.

208. *Id*.

209. *Id.* at 8 (quoting Charlene Harrington et al., *Nursing Home Staffing and Its Relationship to Deficiencies*, 55 J. GERONTOLOGY: SERIES B S278, S284 (2000)).

210. *Id.* (quoting *What is Culture Change?*, PIONEER NETWORK, https://www.pioneernetwork.net/elders-families/what-is-culture-change/ (last visited Aug. 14, 2021)). It is easy to understand why this would be the case. A majority of adults would prefer to receive care in their own home, according to a 2016 Associated Press poll. *Id.* at 6.

211. *Id*. at 8–9.

212. *Id*. at 9.

213. *Id*.

214. *See id*.

facilities the freedom to create an approach that best fits their patients' needs, coupled with the threat of competition from higher quality facilities, could substantially raise the average quality of nursing homes in Florida.[215]

Finally, other research indicates that nursing homes were especially vulnerable given the extreme airborne transmissibility of the virus.[216] Though familiar preventative measures like social distancing, PPE, and sanitation of surfaces are helpful, the small size of COVID particles and length of time they can stay airborne creates risk of airflow transmission throughout the facility, even through the facility's HVAC ventilation system.[217] Consequently, facilities, especially those with large numbers of residents, could take steps to improve airflow within the facility to reduce cross transmission of the virus, such as converting rooms to dedicated airborne infection isolation rooms so infective particles do not circulate throughout the rest of the facility.[218] Also, facilities can take steps to circulate fresh air throughout the room to reduce airborne concentration of the virus.[219] If this is not feasible, using portable HEPA filters (specific filters that are fine enough to reduce most airborne pathogens) to purify the rooms is an alternative.[220] Discovering the most feasible method takes time, money, and effort, so the best way to implement the above protocols is proper planning, rather than the reactive approach that the industry as a whole took during the pandemic.

Because nursing home deaths made up such a large percentage of the overall COVID-19 death toll, the federal government and the CDC took steps to learn from the COVID-19 disaster by hiring a company to study the effects of COVID-19 on nursing homes and make policy recommendations to prevent another disaster.[221] Most of MITRE's

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215. *Id*.

216. Leibniz Inst. for Tropospheric Rsch., *COVID-19: Indoor Air in Hospitals and Nursing Homes Requires More Attention*, SCI. DAILY (Dec. 12, 2020), https://www.sciencedaily.com/releases/2020/12/201214104710.htm.

217. *Id.*

218. Richard M. Lynch & Reginald Goring, *Practical Steps to Improve Air Flow in Long-Term Care Resident Rooms to Reduce COVID-19 Infection Risk*, 21 JAMDA 893, 893–94 (2020). The study provides a detailed five-step process to create these rooms, through modification to the HVAC system, ventilation that replaces the old air with new air, and creating an air vacuum so that air in the infection isolation room moves outdoors, away from the rest of the facility. *Id.*

219. Leibniz Inst. for Tropospheric Rsch., *supra* note 216.

220. *Id.*

221. Agahi, *supra* note 5, at iii. To find out what went wrong, the CMS tasked a private company, MITRE, with an objective to create a panel of experts and provide recommendations moving forward. *Id.* This independent commission, called the Coronavirus Commission for Safety and

recommendations continue with the same themes recommended by the New York Attorney General Report, the James Madison Policy Brief, and the various scientific studies released in the Journal of the American Medical Directors Association ("JAMDA"). Infection control is lacking, and given the vulnerability of elders, the state should work to "[i]dentify and deploy infection-preventionist resources to provide immediate assistance to nursing homes without full-time infection prevention support, prioritizing those nursing homes in current or anticipated hotspots."[222] Additionally, to address the problems with staffing, nursing homes should implement initiatives to ensure that there is an adequate level of staff in each home and raise awareness for the overall need for certified nursing home staff so more people see it as a career path.[223]

When looking at the various sources of information as a whole and as illustrated by the more properly staffed NFPs, all facilities and regulators should strive to keep an acceptable level of staffing hours, a key metric for quality of care.[224] While adequate staffing is certainly not a catch-all fix for substandard care, it would go an exceptionally long way.[225] Consequently, this suggests that the industry would benefit from a better management structure that can maintain adequate staffing levels, not necessarily an increase in funding from the government.

V. CONCLUSION

The emergency response to protect nursing homes was never going to be enough given the overall unpreparedness of the industry.[226] As discussed in Part II, the governors of California, Florida, New York, and Texas all took drastically different approaches to mitigate the virus, yet all of these approaches yielded similar case and death rates among elders. While the state executives possessed the constitutional power to "slow the spread" through executive orders, the heavily reactive approach was never the best option to keep LTCs safe because most of the issues stemmed from the inherent risks of the industry, vulnerability of elders and the community-type care that they receive. For the LTC

Quality in Nursing Homes, was created to "solicit lessons learned from the early days of the pandemic and recommendations for future actions to improve infection prevention and control measures, safety procedures, and the quality of life of residents within nursing homes." *Id.*

222. *Id*. at 44.
223. *Id.* at 50–51.
224. Paul III et al., *supra* note 166, at 93.
225. *See Why Were Some Nursing Homes Spared the Devastation of COVID-19?*, *supra* note 111.
226. Maltz, *supra* note 113, at 157.

industry, proper planning, preventative measures, and disaster preparedness are the ideal methods to keep elders safe.

To prevent another disaster, such as a severe hurricane or pandemic, from wreaking havoc on nursing homes across the state, the Florida legislature must take affirmative action to create attainable standards that will ensure all nursing home residents are provided with a reasonably safe standard of care. Since adequate staffing and training is a cornerstone of care, most measures should make staffing the center of attention, along with other reforms to regulation that ultimately increase quality of care.

As a starting point, the rules should focus on NFPs as a baseline because they have consistently maintained a higher quality than their FP and PE counterparts;[227] NFPs as a whole have shown that it is possible to maintain an adequate level of staff and break even, so it would make sense that others should follow suit. Whether through regulatory reform or voluntarily, residents would benefit if nursing home facilities moved toward an NFP model that would provide proper staffing. Consequently, transparency needs to increase so facility management and ownership will not use accounting acrobatics to make the facilities look unprofitable when they actually are profitable. Remember, in some facilities the owners own the property, plant, and equipment, then lease those items back to the facilities at exorbitant rates; the LTC looks unprofitable on paper, but the owners are still heavily profiting.[228] Logic would dictate that transparency would help with this problem, so facility owners should be as open as possible and disclose the related parties, such as separate entities for the land and the LTC business. Additionally, increased transparency would foster constructive competition because residents, as the consumer, would be able to hold facilities accountable through demand for that facility, so facilities would compete to maximize value to those consumers. Since safety is a primary concern of residents and their families, it is likely that they will have this power over facilities.

On a more detailed level, the legislature should require LTC facilities to perform comprehensive risk assessment procedures—each facility needs to analyze its specific risks and vulnerabilities to various contingencies, such as what happens if an infection outbreak occurs; what happens if the power goes out; what happens if the facility becomes short staffed; etc. Once each facility has discovered its specific

227. Paul III et al., *supra* note 166, at 93.
228. *See For-Profit Nursing Homes' Pleas*, *supra* note 159.

vulnerabilities and risks, it is more equipped to implement a strategy plan and even to take preventative measures. For example, each facility could maintain a PPE stockpile, maintain an emergency preparedness kit to use only during active emergencies, and ensure that the stockpile is replenished as soon as possible if it is used.

By planning ahead and rethinking facility design and operation, facilities can better equip themselves to respond to a disaster. This means analyzing both the short-term and long-term budgets to see how the facility can improve its ventilation system to prevent airborne spread of infective particles. Increased ventilation helps in two ways because staff members can more adequately isolate sick residents from the rest of the facility, and the increase in fresh air will help mitigate cross-transmission of the virus from staff because increased fresh air reduces concentration of the airborne virus.[229] Also, by taking a step back and analyzing staff patterns, LTC entities that spread staff among multiple facilities can develop a pandemic plan for how to minimize cross transmission when necessary, by finding the ideal balance between staff hours per facility and reduced numbers of staff members that work at multiple facilities. Since there are so many variables that go into nursing home staff levels, such as occupancy rate and level of staffing needs for individual patient treatment plans, there is not an ideal number or formula. However, by analyzing past data for patterns, facilities can move closer to finding the ideal balance to keep residents safe.

While comprehensive risk assessment and planning procedures are certainly important for humanitarian concerns, they also provide facilities with a natural form of tort immunity. Because facilities would inherently raise their standard of care above the reasonable level through comprehensive risk assessment and planning, the risk of negligence and wrongful death liability would be reduced. This both alleviates bottleneck in courts and reduces costs by lowering insurance premiums and the amount of settlement owed to plaintiffs.

Finally, Floridian regulators and the CMS must ensure that there are adequate safeguards in place to provide reasonable assurance that the nursing homes are providing a standard of care that is consistent with their quality ratings.[230] As a starting point, regulators could develop a program that incentivizes facilities not to manipulate their numbers; if facilities find a random audit of their self-reported data threatening,

229. *See* Leibniz Inst. for Tropospheric Rsch., *supra* note 216; Lynch & Goring, *supra* note 218.
230. Silver-Greenberg & Gebeloff, *supra* note 129.

then they will be less likely to falsify information. And most importantly, the inspectors need to do a better job of surprising facilities with their inspections, because if a facility has the opportunity to clean up its act right before the inspector comes, then the inspection is nearly useless. The end goal of the audits and inspections is to create the most reliable quality ratings, which does not appear to be the case in the current state of affairs.

Ultimately, the legislature needs to ensure adequate safeguards are in place to ensure that the rules are being enforced and followed by the nursing home industry, since it is clear that many nursing homes were out of compliance with the existing rules and regulations of the state.[231] If both nursing homes and agencies are unable to follow the rules, then the rules become moot. The Florida Legislature has given the Florida Department of Health the authority to promulgate rules regulating nursing homes. Based on the fact that nursing homes have not been able to meet the regulations, the agency should focus on working with the industry to either establish attainable minimum standards through clear and concise rules or give the industry as a whole the tools it needs to meet the rules. For example, requiring every small nursing home to employ an infection control specialist could be costly. But establishing a service program where a single team of infection control specialists can assist a group of nursing homes makes both economic sense (because the costs are spread amongst multiple homes) and technical sense (because the specialists can learn the strategies that work in some nursing homes and apply them to the other nursing homes).

Additionally, the state is investing time and resources in programs, such as CON, that do not necessarily achieve their objectives. The responsible agencies should weigh the costs and benefits of programs to ensure that they are worth it. While the scope of this Article is not to analyze the cost basis for each program, the research herein suggests that there are some initiatives that work, some that do not, and that all are constrained by cost because there is only so much funding that can be directed towards already expensive long-term care. As such, the industry as a whole could benefit by rules that get the best bang for their buck, rather than perfection—something that seems to be impossible due to the already high amounts of funding that still do not come close to covering the resources LTCs require to operate effectively. Thus, this Article calls for both the legislature and the state administrative

231. O'Donnell, *supra* note 124 (finding that nineteen of the twenty nursing homes audited for emergency protocols had safety concerns).

agencies to take action so nursing homes can run more efficiently and keep residents safe from harm— a nursing home should never cause a resident's condition to get worse.[232]

232. See 42 U.S.C. § 1395i-3(b)(2) (2014). "This mandate means that the resident cannot get worse solely because of being in the nursing home." MORGAN ET AL., *supra* note 150, at 712 (citing 42 C.F.R. § 483.24 *Quality of Life*). In the aftermath of the pandemic, the LTC industry does not appear to have learned its lesson because their findings suggest that an increase in funding is the only way for them to begin improving their quality. The research in this Article found otherwise. Leading Age, *Care for Our Seniors Act: Improving America's Nursing Homes by Learning from Tragedy & Implementing Bold Solutions for the Future*, AM. HEALTH CARE ASS'N 3–4 (2021), https://www.ahcancal.org/Advocacy/Documents/Care%20for%20Our%20Seniors%20Act%20-%20Overview.pdf