

## Failure to Thrive? Long-Term Care’s Tenuous Long-Term Future.

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### I. INTRODUCTION

According to the U.S. Census, by 2030, there will be an estimated three million more residents aged eighty-five and older than there were in 2012.<sup>1</sup> The Urban Institute estimated that “about fifty percent of the population ages eighty-five and older has a disability, compared with only ten percent of the population ages sixty-five to seventy-four.”<sup>2</sup> This growing demographic will have long-term care needs, resulting in serious Medicaid cost implications for states.

What are we doing as a nation to prepare for this “Silver Tsunami”? The answer is simple: effectively nothing. The federal government has made no substantive effort to address our aging future since the Community Living Assistance Services and Supports (CLASS) Act was included in the 2010 Patient Protection and Affordable Care Act (ACA).<sup>3</sup>

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<sup>1</sup> See, e.g., Jennifer M. Ortman et al., *An Aging Nation: The Older Population In The United States*, U.S. CENSUS BUREAU (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

<sup>2</sup> Richard W. Johnson et al., *Meeting the Long-Term Care Needs of the Baby Boomers*, THE RETIREMENT PROJECT (2007), <https://www.urban.org/sites/default/files/publication/43026/311451-Meeting-the-Long-Term-Care-Needs-of-the-Baby-Boomers.PDF>; see Kaiser Family Foundation, *Medicaid’s Role for Seniors* (2017), <http://files.kff.org/attachment/Infographic-Medicoids-Role-for-Seniors> (estimating that 74 percent of those eighty-five and older have a long-term care need).

<sup>3</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

In 2011, the Obama Administration abandoned CLASS after determining that it was “financially unsustainable.”<sup>4</sup> CLASS would have provided long-term care benefits that voluntary payroll contributions would have financed.<sup>5</sup> Congress took bipartisan action to repeal CLASS as part of the American Taxpayer Relief Act of 2012 (Taxpayer Relief Act).<sup>6</sup> The Taxpayer Relief Act created a Commission on Long-Term Care.<sup>7</sup> The Commission’s ambitious task was to “develop a plan for the establishment, implementation, and financing of a comprehensive, coordinated, and high-quality system that ensures the availability of long-term services and supports for individuals in need of such services and supports.”<sup>8</sup> It was intended to benefit the elderly, those with “substantial cognitive or functional limitations,” those needing help performing daily activities, and those wanting a long-term care plan.<sup>9</sup> Predictably, the 2013 report to Congress noted, “The Commission did not agree on a financing approach, and, therefore, makes no recommendation.”<sup>10</sup> For example, the Commission considered, but ultimately did not agree upon, creating a long-term care benefit within Medicare.<sup>11</sup>

Meanwhile, with no national plan to address our current, let alone future, long-term care needs, the federal deficit is exploding due to President Trump’s tax cuts.<sup>12</sup> This could potentially create a collision between demographic needs and resources, and policymakers have made it clear where their priorities lie. For example, former U.S. House Speaker Paul Ryan (R-Wis.) asserted that “it’s the health care entitlements that are the big drivers of our debt, so we spend more time on the health care entitlements—because that’s really where the problem

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<sup>4</sup> See, e.g., Jason Kane, *What the Death of the CLASS Act Means for Long-Term Disability Care*, PBS (Oct. 14, 2011), <https://www.pbs.org/newshour/health/what-the-death-of-the-class-act-means-for-long-term-disability-care>.

<sup>5</sup> *Id.*

<sup>6</sup> See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 § 642, 126 Stat. 2313, 2358.

<sup>7</sup> See *id.* § 643(a).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 643(b).

<sup>10</sup> U.S. SENATE COMM’N ON LONG-TERM CARE, REPORT TO THE CONGRESS 61 (2013), <http://ltccommission.org/ltccommission/wp-content/uploads/2013/12/Commission-on-Long-Term-Care-Final-Report-9-26-13.pdf>.

<sup>11</sup> *Id.* at 66-68.

<sup>12</sup> See, e.g., Jim Tankersley, *How the Trump Tax Cut is Helping to Push the Federal Deficit to \$1 Trillion*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/business/trump-corporate-tax-cut-deficit.html> (“The Trump administration had said that the tax cuts would pay for themselves by generating increased revenue from faster economic growth, but the White House has acknowledged in recent weeks that the deficit is growing faster than it had expected.”).

lies, fiscally speaking.”<sup>13</sup>

Medicaid is a state and federal partnership. Each state receives a federal match of no less than one dollar for every dollar spent on Medicaid, based upon “per capita income”—poorer states receive more, and wealthier states receive less.<sup>14</sup> Lately, while most public and political attention has focused on Medicaid expansion under the ACA, “legacy” or “traditional” Medicaid has funded long-term care for decades.<sup>15</sup>

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<sup>13</sup> Jeff Stein, *Ryan Says Republicans to Target Welfare, Medicare, Medicaid Spending in 2018*, WASH. POST (Dec. 6, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/12/01/gop-eyes-post-tax-cut-changes-to-welfare-medicare-and-social-security/?noredirect=on&utm\\_term=.f73f06fe4d79](https://www.washingtonpost.com/news/wonk/wp/2017/12/01/gop-eyes-post-tax-cut-changes-to-welfare-medicare-and-social-security/?noredirect=on&utm_term=.f73f06fe4d79) (Although Ryan is no longer in office, this conservative philosophy lives on.).

<sup>14</sup> See 42 U.S.C. § 1396d(b) (2012). This has the unintended effect of allowing poorer states to further reduce taxes at the expense of “donor” states. Brendan Williams, *My Turn: A Fairer Return on Federal Dollars for N.H.*, CONCORD MONITOR (July 13, 2016), <https://www.concordmonitor.com/N-H-Medicaid-funding-3398300> (“For every dollar New Hampshire spends on Medicaid it receives one federal dollar – evenly splitting the responsibility. In contrast, in Mississippi the federal government pays 74.6% of the Medicaid bill. This subsidy from states like New Hampshire allows policymakers in poorer states to more easily fund Medicaid while crowing about their fiscal conservatism.”).

<sup>15</sup> Traditional Medicaid was also under assault in legislation that just ostensibly sought to repeal-and-replace the ACA. See Dylan Scott, *How Medicaid Became the Most Important Battleground in American Health Care*, VOX (Nov. 10, 2017), <https://www.vox.com/policy-and-politics/2017/11/10/16118644/medicaid-future> (“Medicaid, long the forgotten sibling of our social safety net, has now become the central battleground in the fight over America’s social compact.”). Under spending caps that came close to congressional passage, “Medicaid spending would have been cut by 35 percent, versus current law, after two decades of those spending caps.” *Id.* CMS Administrator Seema Verma continues to advocate for implementing limits on Medicaid spending. Priyanka Dayal McCluskey, *Medicaid Needs to Change, Head of Program Says in Boston, and That Includes Spending Caps*, BOS. GLOBE (Apr. 25, 2018), <https://www.bostonglobe.com/business/2018/04/25/medicaid-needs-change-trump-head-program-says-boston/BnjdhASdGtHEdQxxybC6qO/story.html>, (“Spending limits could be imposed on a per-patient basis, or per state. State spending caps are known as block grants.”). These artificial caps would be disastrous given the inexorability of the coming age wave. State parsimony has been enough of a “cap” without limiting federal matching funds and creating a disincentive for states to spend. But tragic consequences are unlikely to dissuade the current administration. See Brendan Williams, *Medicaid Cuts are the Real ‘Death Panels’*, USA TODAY (Apr. 28, 2017), <https://www.usatoday.com/story/opinion/2017/04/28/medicaid-cuts-real-death-panels-column/100939932/> (“Seema Verma, designed an Iowa managed care system with disastrous new administrative burdens, payment delays and denials for providers — along with massive state cost overruns.”). At the same time Verma seeks to cut Medicaid funding, she is seeking to increase nursing home staffing with no new Medicaid funding to pay for it. See Press Release, U.S. Centers for Medicare & Medicaid Services, CMS Strengthens Nursing Home Oversight and Safety to Ensure Adequate Staffing (Nov. 30, 2018). This could create a perfect staffing crisis storm. In New Hampshire, for example, Medicaid rates were only going up an average of .11 percent on January 1, 2019, equal to seven cents per resident, per day, in a state with the third-lowest

Medicaid's vital safety net faces existential threats, largely as a result of two successive presidents' indifference towards Medicaid.<sup>16</sup> The nation has come a distance from the compassion that President Lyndon Johnson demonstrated in signing Medicare and Medicaid into law in the library of President Harry Truman, handing out 72 pens used to sign the measure.<sup>17</sup> Johnson promised that "no longer will this nation refuse the hand of justice to those who have given a lifetime of service and wisdom and labor to the progress of this progressive country."<sup>18</sup> In an emotional speech, Johnson stated, "There are those alone in suffering who will now hear the sound of some approaching footsteps coming to help."<sup>19</sup>

However, Johnson's lofty ideals in 1965 got in the way of today's parsimony toward the poor. In 2015, at the urging of the Obama Administration and state governments, the U.S. Supreme Court held that providers did not have standing to sue over Medicaid cuts in *Armstrong v. Exceptional Child Center, Inc.*<sup>20</sup> Siding with the majority in the 5-4 decision, Justice Breyer rhapsodized "that administrative agencies are far better suited to this task than judges."<sup>21</sup> Thus, only the U.S. Centers for Medicare & Medicaid Services (CMS), under the U.S. Department of Health & Human Services, was the proper arbiter of providers' Medicaid underfunding claims.

In its brief, the Obama Administration stated:

The reimbursement relationship between a State and a provider is essentially contractual in nature. It would be anomalous for one party to a prospective or existing contract (a provider) to have a legal *right* – a cause of action – to insist that the other party (the State) increase its offer for a future contract or to increase its

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unemployment rate. See Brendan Williams, *Lawmakers Must Address Medicaid Funding Neglect*, CONCORD MONITOR (Nov. 21, 2018), <https://www.concordmonitor.com/Medicare-payments-21678575>.

<sup>16</sup> See, e.g., Brendan Williams, *How the Obama administration made it possible to gut Medicaid*, THE HILL (June 12, 2017), <https://thehill.com/blogs/pundits-blog/healthcare/337467-how-the-obama-administration-made-it-possible-to-gut-medicaid>.

<sup>17</sup> See John D. Morris, *President Signs Medicare Bill; Praises Truman*, N.Y. TIMES (July 31, 1965), <https://timesmachine.nytimes.com/timesmachine/1965/07/31/101558385.pdf>.

<sup>18</sup> *Transcript of Remarks by Truman and Johnson on Medicare*, N.Y. TIMES (July 31, 2015), <https://timesmachine.nytimes.com/timesmachine/1965/07/31/101558459.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> 135 S. Ct. 1378, 1384 (2015).

<sup>21</sup> *Id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment).

payments under an existing contract.<sup>22</sup>

This was a rather disingenuous argument, for where *else* would a remedy lie but in court? Medicaid contracts are effectively contracts of adhesion, where there is an enormous imbalance of power between the contracting parties—contracts are presented on a take-it-or-leave-it basis. For example, if 62 percent of those whom a provider is caring for are on Medicaid, as is true for nursing homes on average, how can a provider simply refuse a non-negotiable Medicaid contract?<sup>23</sup>

Congressional Democrats, including House Minority Leader Nancy Pelosi (D-Calif.) and then-Senate Majority Leader Harry Reid (D-Nev.), filed their own brief with the Court, disagreeing with the Obama Administration's position: "[t]his case implicates . . . the right to seek equitable relief under the Supremacy Clause against state law that is inconsistent with Congressional enactments."<sup>24</sup> Under their interpretation, the law "provides impoverished, developmentally disabled Medicaid patients and the medical providers who serve them a means of redress in the court system that they would often not have in the political battles over budget priorities."<sup>25</sup>

From his ivory tower, Justice Breyer apparently did not foresee the unhappy marriage of administrative deference with a Trump Administration that disfavors administrative oversight, when he cast his deciding vote in *Armstrong*.<sup>26</sup>

In March 2018, under the guise of furthering "*President Trump's commitment to 'cutting the red tape' by relieving states of burdensome paperwork requirements,*" CMS proposed a rule to allow states with managed care insurers running their Medicaid programs to more freely cut Medicaid rates—by up to "4% percent in overall service category

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<sup>22</sup> Brief for the United States as Amicus Curiae Supporting Petitioners at 31, *Armstrong vs. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015) (No. 14-15).

<sup>23</sup> See Kaiser Family Foundation, *Medicaid's Role in Nursing Home Care* (June 20, 2017), <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/>; Jessica Wheeler, *Armstrong vs. Exceptional Child Center: Who Should Enforce Equal Access?*, MINN. L. REV. (Dec. 22, 2017), <http://www.minnesotalawreview.org/2017/12/armstrong-v-exceptional-child-center/> ("If one believes Medicaid beneficiaries should get the same access to health care as the general public, allowing providers to bring private enforcement actions is the most efficient way to ensure it.").

<sup>24</sup> Brief of Members of Congress as Amici Curiae in Support of Respondents at 2, *Armstrong vs. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015) (No. 14-15).

<sup>25</sup> *Id.* at 15.

<sup>26</sup> See, e.g., Alan Levin & Alyza Sebenius, *Trump Claims \$1.6 Billion a Year Saved From Cutting Red Tape*, BLOOMBERG (Oct. 16, 2018), <https://www.bloomberg.com/news/articles/2018-10-17/trump-administration-claims-23-billion-in-regulation-savings>.

spending during a State fiscal year (and 6% over two consecutive years)”—*without federal oversight*.<sup>27</sup> In its proposed rule, CMS states, “We continue to believe that changes below 4 percent are generally nominal[.]”<sup>28</sup> Indeed, CMS states:

We are requesting comments to determine whether the nominal threshold should be higher or lower than 4 percent for a single SFY and 6 percent for 2 consecutive SFYs, recognizing that state legislatures need sufficient flexibility to manage budgets and make adjustments to Medicaid spending that are unlikely to result in diminished access to care for program beneficiaries.<sup>29</sup>

As Professor Andy Schneider of Georgetown University wrote, “The underlying philosophy seems to be ‘don’t ask, don’t know.’ The federal courts will no longer hear provider challenges to low payment rates, and now CMS no longer wants information on the effect of payment cuts so that it can do its job.”<sup>30</sup>

Increasingly, those needing assistance with the activities of daily living have alternatives to nursing home care, where such alternatives can meet their needs. A May 2018 report noted that “[h]ome and community-based services (HCBS) have accounted for almost all Medicaid LTSS growth in recent years while institutional service expenditures remained

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<sup>27</sup> Press Release, U.S. Centers for Medicare & Medicaid Services, CMS Proposes Regulation to Alleviate State Burden (May 22, 2018), <https://www.cms.gov/newsroom/press-releases/cms-proposes-regulation-alleviate-state-burden>. Many states have turned over their Medicaid programs to managed care insurers, despite the lack of any empirical evidence that this improves care. See, e.g., Brendan Williams, *Leap of Faith: Managed Care and the Privatization of Long-Term Care Services*, 30 LOY. CONSUMER L. REV. 438, 438-459 (2018). These insurers are intent on maximizing profit to the detriment of providers and beneficiaries alike, going so far, for example, as to deny wheelchairs to Iowans with disabilities despite physician and state orders to provide them. See Jason Clayworth, *Iowa Medicaid Company Forced to Provide Special Wheelchairs to Disabled Clients*, DES MOINES REG. (Aug. 20, 2018), <https://www.desmoinesregister.com/story/news/investigations/2018/08/20/provide-them-wheelchairs-judges-tell-iowa-medicaid-company/976986002/> (“[A]ppeals by UnitedHealthcare — each involving a severely disabled Iowan who can’t walk independently — lingered for more than a year while the managed care provider denied doctor and state orders that it pay for the specialized equipment.”).

<sup>28</sup> Medicaid Program; Methods for Assuring Access to Covered Medicaid Services—Exemptions for States With High Managed Care Penetration Rates and Rate Reduction Threshold, 83 Fed. Reg. 12696, 12698 (Mar. 23, 2018) (to be codified at 42 CFR pt. 447).

<sup>29</sup> *Id.* at 12699. What about the ability of Medicaid providers “to manage budgets”?

<sup>30</sup> Andy Schneider, *‘Rolling Back’ the Medicaid Access Rule: Don’t Ask, Don’t Know, SAY AHHH!* (Apr. 2, 2018), <https://ccf.georgetown.edu/2018/04/02/rolling-back-the-medicaid-access-rule-dont-ask-dont-know/>.

close to the FY 2010 amount.”<sup>31</sup> In 2016, HCBS spending accounted for 57 percent of Medicaid long-term care spending.<sup>32</sup> This proportion was as high as 81 percent for Oregon and as low as 27 percent for Mississippi.<sup>33</sup>

Yet, the entire continuum of long-term care faces severe challenges, even before the coming age wave crashes upon states’ budgetary shores.

It is not as if older Americans are saving enough to avoid Medicaid. As one article reported in August 2018, “The rate at which Americans at least seventy-five-years-old filed for bankruptcy more than tripled from 1991 to 2016, while filings among those between sixty-five and seventy-four ballooned more than 200 percent, according to a recent study from a group of professors working with data from the Consumer Bankruptcy Project.”<sup>34</sup> Further, of those filing for bankruptcy, “about three in five said unmanageable medical expenses played a role.”<sup>35</sup>

This trend will only get worse, as Americans lack retirement resources. A 2014 *Time* article noted that “[b]ecause defined benefit plans are more costly for employers than defined contribution plans, most of them have –you guessed it –scaled back dramatically or eliminated these plans altogether in recent years.”<sup>36</sup> A 2018 *Atlantic* article reported that “the median savings in a 401(k) plan for people between the ages of 55 and 64 is currently just \$15,000, according to the National Institute on Retirement Security, a nonprofit.”<sup>37</sup> As the article noted, “the current

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<sup>31</sup> Steve Eiken et al., *Medicaid Expenditures for Long-Term Services and Supports in FY 2016*, IBM WATSON HEALTH (2018), <https://www.medicaid.gov/medicaid/lts/downloads/reports-and-evaluations/ltssexpenditures2016.pdf>.

<sup>32</sup> *See id.* at 6.

<sup>33</sup> *See id.* at 7.

<sup>34</sup> Andrew Soergel, *Bankruptcy Soars Among Elderly as Inequality Deepens*, U.S. NEWS & WORLD REP. (Aug. 8, 2018), <https://www.usnews.com/news/data-mine/articles/2018-08-08/bankruptcy-soars-among-elderly-as-inequality-deepens>.

<sup>35</sup> Tara Siegel Bernard, *‘Too Little Too Late’: Bankruptcy Booms Among Older Americans*, N.Y. TIMES (Aug. 5, 2018), <https://www.nytimes.com/2018/08/05/business/bankruptcy-older-americans.html>.

<sup>36</sup> *What is the Difference Between a Defined Benefit Plan and a Defined Contribution Plan?*, TIME (May 20, 2014), <http://time.com/money/2791222/difference-between-defined-benefit-plan-and-defined-contribution-plan/>.

Policymakers of both parties have abetted this practice. In 2015, in the progressive state of Washington, even a Democratic governor browbeat aerospace machinists into giving up defined-benefit pensions in their contract negotiations with Boeing. *See, e.g.*, Jim Brunner, *Labor Group Disinvites Inslee Over Boeing Tensions*, SEATTLE TIMES (July 20, 2015), <https://www.seattletimes.com/seattle-news/politics/labor-group-disinvites-inslee-over-boeing-tensions/>.

<sup>37</sup> Alana Semuels, *This is What Life Without Retirement Savings Looks Like*, THE ATLANTIC (Feb. 22, 2018), <https://www.theatlantic.com/business/archive/2018/02/pensions-safety-net-california/553970/>.

wave of senior poverty could just be the beginning. Two-thirds of Americans don't contribute any money to a 401(k) or other retirement account, according to Census Bureau researchers."<sup>38</sup> Two writers in the *Harvard Business Review* "predict the U.S. will soon be facing rates of elder poverty unseen since the Great Depression[.]"<sup>39</sup> Meanwhile, "[t]here's one area where the traditional pension plan is getting new life: as a tax dodge for wealthy business owners."<sup>40</sup>

This article addresses funding for the continuum of long-term care through nursing homes, assisted living facilities, and in-home care. Next, the article offers some thoughts on how to address the governmental costs of long-term care and secure a more stable future.

## II. LONG-TERM CARE'S CHALLENGED CONTINUUM

### A. Nursing Homes

Once the default choice for long-term care, today, nursing homes (often called "skilled nursing facilities") are generally reserved for truly-debilitated Medicaid long-term care beneficiaries; in 2014, 63.1 percent of nursing home residents needed assistance with at least four out of five daily living activities.<sup>41</sup> In eight states, at least half of the residents were eighty-five-years-old or older.<sup>42</sup> Perhaps more amazingly, in ten states, between 10.2 percent and 13.3 percent of residents were *ninety-five-years-old or older*.<sup>43</sup> Most residents had moderate to severe cognitive impairment.<sup>44</sup> Given that women live longer, they comprised the majority of residents—65.6 percent.<sup>45</sup>

The Medicare Payment Advisory Commission's annual report to Congress found that in 2016, nursing home services were operating only

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<sup>38</sup> *Id.*

<sup>39</sup> Teresa Ghilarducci & Tony James, *Americans Haven't Saved Enough for Retirement. What Are We Going to Do About It?*, HARV. BUS. REV. (Mar, 28, 2018), <https://hbr.org/2018/03/americans-havent-saved-enough-for-retirement-what-are-we-going-to-do-about-it>.

<sup>40</sup> Ben Steverman, *Rich Business Owners Are Using Pension Plans to Stash Money and Get a Tax Break*, L.A. TIMES (Aug. 15, 2018), <https://www.latimes.com/business/la-fi-pension-tax-deduction-20180815-story.html>.

<sup>41</sup> U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., NURSING HOME DATA COMPENDIUM 2015 EDITION 156, [https://www.cms.gov/Medicare/Provider-EnrollmentandCertification/CertificationandCompliance/Downloads/nursinghomedatacompendium\\_508-2015.pdf](https://www.cms.gov/Medicare/Provider-EnrollmentandCertification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf).

<sup>42</sup> *Id.* at 153.

<sup>43</sup> *Id.* at 154.

<sup>44</sup> *Id.* at 159.

<sup>45</sup> *Id.* at 199. That proportion is highest in Rhode Island (71.6 percent) and New Hampshire (71.4 percent). *Id.*

at a .7 percent margin, down from 1.6 percent in 2015—or actually in the negative (-2.3%) if Medicare payments were excluded.<sup>46</sup> Nationally, Medicaid spending on nursing home care only went up .9 percent in 2016 and .7 percent in 2017.<sup>47</sup>

How has the federal government responded to this funding crisis? It has piled on more regulations; although, as this author once argued, “[s]hort of nuclear reactors, nursing homes may be the most regulated industry—down to the water temperature.”<sup>48</sup> The new federal regulations, which one proponent exulted would mean “[ab]out 1.4 million people living in nursing homes across the country can now be more involved in their care,”<sup>49</sup> carry a cost that the federal government projected is “about \$831 million in the first year and \$736 million per year for subsequent years. While this is a large amount in total, the average cost per facility is estimated to be approximately \$62,900 in the first year and \$55,000 in subsequent years.”<sup>50</sup>

As to the unfunded cost burden, CMS dismissed it: “We understand that for some facilities Medicaid reimbursement accounts for a large portion of its funding, however the specifics regarding Medicaid funding is regulated by the State and outside the scope of this regulation.”<sup>51</sup> CMS further stated that “[a]lthough the overall magnitude of cost related to this regulation is economically significant, we note that these costs are significantly less than the amount of Medicare and Medicaid spending for LTC services.”<sup>52</sup> Consider that statement. If the average nursing home

<sup>46</sup> MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 207 (2018), [http://www.medpac.gov/docs/default-source/reports/mar18\\_medpac\\_entirereport\\_sec.pdf?sfvrsn=0](http://www.medpac.gov/docs/default-source/reports/mar18_medpac_entirereport_sec.pdf?sfvrsn=0). See Stephen Campbell, *U.S. Nursing Assistants Employed in Nursing Homes*, PHI (2018), <https://phinational.org/resource/u-s-nursing-assistants-employed-in-nursing-homes-2018/> (Ninety-one percent of their front-line caregivers, nursing assistants, are also women.).

<sup>47</sup> U.S. Ctrs. For Medicare & Medicaid Servs., *Nursing Care Facilities and Continuing Care Retirement Communities Expenditures*, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-andReports/NationalHealthExpendData/NationalHealthAccountsHistorical.html> (open NHE Tables zip file; then open Table 15).

<sup>48</sup> Brendan Williams, *Costly New Medicaid Regs Will Cripple Nursing Homes*, THE HILL (Sept. 10, 2015), <https://thehill.com/blogs/congress-blog/healthcare/253100-costly-new-medicare-regs-will-cripple-nursing-homes>.

<sup>49</sup> Susan Jaffe, *New Rules Give Nursing Home Residents More Power*, WASH. POST (Dec. 27, 2016), [https://www.washingtonpost.com/national/health-science/new-rules-give-nursing-home-residents-morepower/2016/12/27/c0959f74-c894-11e6-bf4b-2c064d32a4bf\\_story.html?utm\\_term=.a2ffb202b7af](https://www.washingtonpost.com/national/health-science/new-rules-give-nursing-home-residents-morepower/2016/12/27/c0959f74-c894-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.a2ffb202b7af).

<sup>50</sup> Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68688, 68844 (Oct. 4, 2016).

<sup>51</sup> *Id.* at 68837.

<sup>52</sup> *Id.* at 68844.

in 2016 operated at a .7% margin, as the federal government itself reported,<sup>53</sup> then that facility would have needed to generate around \$800,000 in income just to afford the \$55,000 annual cost that the federal government projected for its new regulations (possibly an understated amount).

The scale of injury that the state governments' knowing failure to pay Medicaid care costs is easiest to assess with nursing homes, as the Balanced Budget Act of 1997 requires states to file detailed cost reports that the states will then audit.<sup>54</sup>

Since nursing homes are more visible, and subject to exacting reporting and survey requirements, they receive bad publicity for issues not uncommon elsewhere among the elderly, such as individual with dementia using antipsychotic (AP) drugs.<sup>55</sup> As the American Association of Retired Persons has found, "While efforts to reduce AP use among dementia patients living in nursing homes are showing some success, less attention is given to older adults living in the community."<sup>56</sup> This study found that AP rates rose between 2012 and 2015 among community-only adults with dementia who were enrolled in Medicare Advantage (MA) plans.<sup>57</sup> According to the National Partnership to Improve Dementia Care in Nursing Homes, AP use among nursing home residents declined by approximately 34 percent during this time.<sup>58</sup> However, news organizations, like the *Washington Post*, undermine these facts with lurid headlines such as: "Why are nursing homes drugging dementia patients without their consent?"<sup>59</sup>

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<sup>53</sup> See MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 46.

<sup>54</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>55</sup> *Id.*

<sup>56</sup> Elizabeth A. Carter, *Off-Label Antipsychotic Use in Older Adults with Dementia: Not Just a Nursing Home Problem*, AARP (2018), <https://www.aarp.org/content/dam/aarp/ppi/2018/04/off-label-antipsychotic-use-in-older-adults-with-dementia.PDF>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2.

<sup>59</sup> Hannah Flamm, *Why are Nursing Homes Drugging Dementia Patients Without Their Consent?*, WASH. POST (Aug. 10, 2018), [https://www.washingtonpost.com/outlook/2018/08/10/8baff64a-9a63-11e88d5ec6c594024954\\_story.html?utm\\_term=.c17529d7c517](https://www.washingtonpost.com/outlook/2018/08/10/8baff64a-9a63-11e88d5ec6c594024954_story.html?utm_term=.c17529d7c517).

This was an entirely anecdotal story where the author reports having "visited more than 100 nursing homes across six states" and extrapolates her conclusions from those visits. *Id.* Yet there are over 15,000 nursing homes nationwide. See *Fast Facts*, AM. HEALTH CARE ASS'N, [https://www.ahcancal.org/research\\_data/Pages/Fast-Facts.aspx](https://www.ahcancal.org/research_data/Pages/Fast-Facts.aspx) (last visited Aug. 21, 2018). The federal measure for nursing home quality – the five-star system – also has the potential to mislead, as consumers will not be aware it grades on a curve. See Brendan Williams, *An Attack on New Hampshire Long-Term Care*, CONCORD MONITOR (2018) (it "requires no fewer than 20 percent of nursing homes in each

Such stories make it challenging to focus attention on the need to improve funding. No other healthcare sector is more vulnerable to being defined by anecdotes about single bad actors. Those remembering the devastation inflicted by Hurricane Irma in 2017 may recall the Florida nursing home where residents died from heat-related causes after the hurricane knocked out the facility's air conditioning.<sup>60</sup> However, they are unlikely to even know about every other facility that weathered the storm due to extraordinary staff preparation. Some who remember Hurricane Katrina in 2005 may recall the tragedy of St. Rita's Nursing Home, where thirty-five residents died at the small family-owned facility.<sup>61</sup> But, those who remember the tragedy may not think about all of the facilities where staff heroically saved their charges from harm in

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state receive a one-star rating – and roughly 23.3 percent receive a two-star rating; only 10 percent can get the highest rating.”). And because these assessments are state-specific, a one-star building in a high-quality state might be a five-star in a low-quality state. *See id.*

<sup>60</sup> *See, e.g.,* Tonya Alanez & Erika Pesantes, *12 Nursing Home Deaths in Hollywood Ruled as Homicides*, SUN SENTINEL (Nov. 22, 2017), <https://www.sun-sentinel.com/news/hollywood-nursing-home-hurricane-deaths/fl-sb-nursing-home-homicides-official-20171122-story.html>. There can be no excuse for resident neglect. Even if government funding is insufficient to support quality care, a responsible provider should close a facility, and not blame external forces. *See, e.g.,* Sabriya Rice & Holly K. Hacker, *Too Many Lawsuits or Bad Nursing Home Care? What's Behind Bankruptcy, Injuries, Deaths at Texas-Based Chain*, DALLAS MORNING NEWS (Jan. 25, 2018), <https://www.dallasnews.com/business/health-care/2018/01/25/preferred-care-texas-based-nursing-home-elder-neglect-injury-death-bankruptcy> (“A stream of documented complaints from three separate states flows back to one nursing home operator: Preferred Care of Plano, which filed for bankruptcy in November.” As an excuse for alleged resident neglect, the company “cited more than 160 ‘predatory’ lawsuits” and stated legal fees constrained “its ability to spend money on patient care.”).

<sup>61</sup> They will not know that the owners were acquitted of negligent homicide charges because they were not the real culprits. *See* Michael Dirda, *Book World: James A. Cobb Jr.'s 'Flood of Lies: The St. Rita's Nursing Home Tragedy'*, WASH. POST (Oct. 16, 2013), [https://www.washingtonpost.com/entertainment/books/book-world-james-a-cobb-jrs-flood-of-lies-the-st-ritas-nursing-home-tragedy/2013/10/16/08952704-31bc-11e3-89ae16e186e117d8\\_story.html?utm\\_term=.1663aefc5dde](https://www.washingtonpost.com/entertainment/books/book-world-james-a-cobb-jrs-flood-of-lies-the-st-ritas-nursing-home-tragedy/2013/10/16/08952704-31bc-11e3-89ae16e186e117d8_story.html?utm_term=.1663aefc5dde) (“[T]he storm itself would have resulted in only a foot of flooding; the failure of the levees created the tremendous 10-foot deluge. And whose fault was that? The Army Corps of Engineers, which eventually admitted that the levees were poorly built and shoddily maintained.”). That 45 people also died at a New Orleans hospital did not initiate an anti-hospital clamor. *See, e.g.,* Sheri Fink, *The Deadly Choices at Memorial*, N.Y. TIMES (Aug. 25, 2009), [https://www.nytimes.com/2009/09/13/magazine/13letters-t-THEDEADLYCHO\\_LETTERS.html](https://www.nytimes.com/2009/09/13/magazine/13letters-t-THEDEADLYCHO_LETTERS.html) (“Mortuary workers eventually carried 45 corpses from Memorial, more than from any comparable-size hospital in the drowned city.”). According to the exhaustive *Times* article, “it appears that at least 17 patients were injected with morphine or the sedative midazolam, or both, after a long-awaited rescue effort was at last emptying the hospital.” *Id.*

extreme conditions.<sup>62</sup> By contrast, few members of the public know of the alarming federal report to Congress, declaring that nursing homes nationally are effectively operating at a loss<sup>63</sup> because that finding appears to have generated no mainstream media coverage.

While critics challenge the nursing home sector nationally, it is better to get old and infirm in some states rather than in others. In Oklahoma, for example, one nursing home provider noted the reimbursement rate was \$146 a day, or \$134 if a provider tax was subtracted: “Clearly, \$134 a day does not come close to covering the cost of round-the-clock room and board, let alone meeting payroll requirements for nursing staff. By comparison, Oklahoma state legislators receive a daily per-diem \$156.50 when they are in session.”<sup>64</sup> Whereas, the 2018 “basic” nursing home payment rate in Oregon, also the nation’s leader in funding HCBS, was \$312.87 per patient day.<sup>65</sup>

Underfunding in Oklahoma caused the 2018 closure of the Pawhuska Nursing Home, which had been “open for more than 60 years,” displacing residents and staff from their rural community.<sup>66</sup>

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<sup>62</sup> In 2018, California nursing homes were forced to evacuate in the face of wildfires, as one article related:

How do you evacuate a nursing home when the deadliest wildfire in California history is bearing down and there are 91 men and women to move to safety — patients in need of walkers or wheelchairs or confined to hospital beds, suffering from dementia, recovering from strokes?

The fire is coming fast. Help is not.

Maria L. La Ganga, *California Fire: If You Stay, You’re Dead. How a Paradise Nursing Home Evacuated*, L.A. TIMES (Nov. 17, 2018), <https://www.latimes.com/local/california/la-me-ln-nursing-home-fire-evac-20181117-story.html>.

<sup>63</sup> See MEDICARE PAYMENT ADVISORY COMM’N, *supra* note 46.

<sup>64</sup> Tom Coble, *A Huge Fiscal Cliff Looms for Skilled Nursing*, MCKNIGHT’S LONG-TERM CARE NEWS (Aug. 17, 2018), <https://www.mcknights.com/guest-columns/a-huge-fiscal-cliff-looms-for-skilled-nursing/article/788893/>. And maybe you get what you pay for. Oklahoma had among the nation’s lowest-ranked nursing home care quality, according to one study. See Corey Jones, *AARP Report Provides Indicators of How Oklahoma Nursing Homes are ‘Failing to Provide Basic Levels of Care’*, TULSA WORLD (Sept. 4, 2018) (The head of the Oklahoma Association of Health Care Providers pointed out that “the reimbursement rate of \$144.67 a resident per day in Fiscal Year 2017 was below the audited cost of \$165.38, which was established by the Oklahoma Health Care Authority.”). The payment shortfall, cited in the *Tulsa World* article, bears inexorably upon staff compensation, recruitment, and retention.

<sup>65</sup> See Letter from Or. Dep’t of Human Servs. to All Or. Nursing Facilities (July 10, 2018), <https://www.oregon.gov/DHS/PROVIDERS-PARTNERS/LICENSING/AdminAlerts/1.%20NF%20Rate%20Letter%202018%20-%20Supplemental.pdf>.

<sup>66</sup> Jessica Remer, *Pawhuska Nursing Home Shuttering Due to State Budget Cuts*, KTUL.COM (Jan. 25, 2018), <https://ktul.com/news/local/pawhuska-nursing-home-shuttering-due-to-state-budget-cuts>.

Oklahoma's nursing homes had reportedly "lost more than \$93 million in state and federal appropriations since 2010."<sup>67</sup> During that time, Governor Mary Fallin responded to state budget woes by declaring an "Oilfield Prayer Day."<sup>68</sup> Cities in Oklahoma were looking to take over nursing homes as a gambit to increase facility reimbursement, as government-run facilities can draw down more federal reimbursement.<sup>69</sup> In Indiana, "A wrinkle in Medicaid's complex funding formula gives Indiana nursing homes owned or leased by city or county governments a funding boost of 30 percent per Medicaid resident. The money is sent to the hospitals, which negotiate with the nursing homes over how to divvy it up."<sup>70</sup> One Pulaski County hospital alone acquired ten nursing homes statewide.<sup>71</sup>

All long-term care is subject to the vagaries of state budget decisions.<sup>72</sup> In Montana, one 2018 editorial noted that: "already rock-bottom Medicaid reimbursement rates were lowered even more, leaving providers throughout the state in the impossible position of either cutting their Medicaid clients or continuing to serve them at a loss."<sup>73</sup>

Massachusetts is commonly known as a progressive state, yet one Massachusetts nursing home provider wrote a column noting that "financial data filed with the state's Center for Health Information and

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<sup>67</sup> *Id.*

<sup>68</sup> Derek Hawkins, *Oklahoma Gov. Mary Fallin Says All Faiths, Not Just Christians, Should Observe 'Oilfield Prayer Day'*, WASH. POST (Oct. 11, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/10/11/okla-gov-mary-fallin-says-all-faiths-not-just-christians-should-observe-oilfield-prayer-day/?utm\\_term=.41926d0ddcda](https://www.washingtonpost.com/news/morning-mix/wp/2016/10/11/okla-gov-mary-fallin-says-all-faiths-not-just-christians-should-observe-oilfield-prayer-day/?utm_term=.41926d0ddcda).

<sup>69</sup> See Paul Monies, *Cities Become Owners of Nursing Homes, Expecting Windfall from Feds*, OKLA. WATCH (Sept. 16, 2018), <https://oklahomawatch.org/2018/09/16/cities-become-owners-of-nursing-homes-expecting-windfall-from-feds/> (One city, with less than 6,300 residents, now owns 28 nursing homes around the state, and "[i]n all, licenses for 46 nursing homes are now owned by cities or towns"). Whether the federal government would approve this was a gamble.

<sup>70</sup> Phil Galewitz, *Chasing Millions in Medicaid Dollars, Hospitals Buy up Nursing Homes*, WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/business/economy/chasing-millions-in-medicare-dollars-hospitals-buy-up-nursing-homes/2017/10/13/2be823ca-a943-11e7-92d1-58c702d2d975\\_story.html](https://www.washingtonpost.com/business/economy/chasing-millions-in-medicare-dollars-hospitals-buy-up-nursing-homes/2017/10/13/2be823ca-a943-11e7-92d1-58c702d2d975_story.html). As these sorts of funding schemes are not replicable everywhere, they are just further evidence of the need for a *federal fix* to long-term care finances.

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., Brendan Williams, *Do Right by All Medicaid Care Providers and Their Vulnerable Clients*, NASHUA TELEGRAPH (Jan. 10, 2019) ("If New Hampshire's nursing homes are to continue to be a vital safety net, the 17-cents-a-day Medicaid funding increase they received January 1, for the over-4,000 residents whose care is state-funded, is not going to sustain them.").

<sup>73</sup> Editorial, *No Way to Run a State Budget*, THE MISSOULIAN (Aug. 5, 2018), [https://missoulian.com/opinion/editorial/no-way-to-run-a-state-budget/article\\_8916f59e-ab44-5137-bf5d-f2096d476b88.html](https://missoulian.com/opinion/editorial/no-way-to-run-a-state-budget/article_8916f59e-ab44-5137-bf5d-f2096d476b88.html).

Analysis shows that all types of nursing facilities –family operated, not-for profit, regional, and nationally owned –are teetering on the edge. How else would you describe a sector with more facilities operating on negative rather than positive margins?”<sup>74</sup> This nursing home provider’s family has operated facilities in Massachusetts for sixty-five years.<sup>75</sup>

In its 2017 session, the Texas Legislature failed to adopt a common mechanism to improve federal Medicaid long-term care funding—a so-called “provider tax.”<sup>76</sup> As one newspaper reported, “[t]he fee would raise an estimated \$360 million over two years, going a long way toward bridging a gap in funding. The Medicaid match would increase that to an estimated \$800 million.”<sup>77</sup> In a 2017 column, the President of the Texas Health Care Association (the trade group representing Medicaid-contracting nursing homes) stated, “According to an analysis of the most recent available Medicaid cost report database, the average reportable cost per resident is \$157 a day. The average reimbursement from the state for these same residents is just \$138.”<sup>78</sup>

Yet, Empower Texas, a conservative organization, opposed the Republican-sponsored bill, scoring it as anti-taxpayer and describing it as “[c]reating new hidden fee[s] on residents of nursing home facilities.”<sup>79</sup>

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<sup>74</sup> Matt Salmon, *Nursing Home Sector on Verge of Collapse*, COMMONWEALTH (July 17, 2018), <https://commonwealthmagazine.org/opinion/nursing-home-sector-on-verge-of-collapse/>; see also Press Release, Mass. Senior Care Ass’n, *Lawmakers Told Many Skilled Nursing Facilities on the Verge of Bankruptcy and Possible Closure* (Sept. 11, 2017), <https://www.maseniorcare.org/about/newsroom/lawmakers-told-many-skilled-nursing-facilities-verge-bankruptcy-and-possible-closure> (“A recent analysis of 2016 state cost report data, filed with the Center for Health Information and Analysis (CHIA) shows three quarters of the state’s nursing facilities have a combined negative margin of 4.4%, an indication that the sector is experiencing an unprecedented financial crisis.”).

<sup>75</sup> See Salmon, *supra* note 75.

<sup>76</sup> Every state but Alaska has at least one provider tax. See *States and Medicaid Provider Taxes or Fees*, KAISER FAMILY FOUND. (June 27, 2017), <https://www.kff.org/medicaid/fact-sheet/states-and-medicare-provider-taxes-or-fees/> (“Provider taxes are imposed by states on health care services where the burden of the tax falls mostly on providers, such as a tax on inpatient hospital services or nursing facility beds. Provider taxes have become an integral source of financing for Medicaid.”).

<sup>77</sup> Peggy Fikac, *Nursing Homes Joust Over Fee Proposal: ‘Granny Tax’ or Funding Lifeline?*, SAN ANTONIO EXPRESS-NEWS (Mar. 27, 2017), <https://www.mysanantonio.com/news/local/article/Nursing-homes-joust-over-fee-proposal-Granny-11027904.php>.

<sup>78</sup> Kevin Warren, *Texas Nursing Homes are at the Tipping Point*, TEX. TRIB. (Jan. 5, 2017), <https://www.tribtalk.org/2017/01/05/texas-nursing-homes-are-at-the-tipping-point/>.

<sup>79</sup> See *HB 2766: Creating New Hidden Fee on Residents of Nursing Home Facilities*, EMPOWERTEXANS, <https://index.empowertexans.com/votes/2017-house->

It passed in the Republican House, 96-43, before dying in the Senate.<sup>80</sup>

After the Texas Legislature failed to improve nursing home rates, Genesis HealthCare, one of the nation's largest nursing home providers, announced it would sell all twenty-three of its Texas facilities to a real estate investment trust (REIT).<sup>81</sup> In 2018, the largest nursing home provider in Texas, with over one hundred facilities, declared bankruptcy.<sup>82</sup>

REITs are common owners of nursing facilities, though not the state bed licenses, and the rent pressures that the care providers face do not always operate in the best interests of care.<sup>83</sup> This creates fights between the facility operators and landlords.<sup>84</sup> Genesis, operating more than 450 facilities nationwide, had threatened bankruptcy before announcing, in February 2018, that it “negotiated \$54 million worth of annual lease reductions that are effective retroactively to Jan. 1. The move will cut the company’s rent fees by 11 percent, when compared to 2017.”<sup>85</sup> Also, in 2018, a joint venture saved HCR ManorCare, which operated around five hundred long-term care facilities nationwide, from Chapter 11 bankruptcy by purchasing both ManorCare and the REIT that had owned its facilities.<sup>86</sup> As one article noted, “Former ManorCare landlord Quality Care Properties had been locked in an extended battle with its tenant over

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vote-rv1141 (last visited Aug. 20, 2018).

<sup>80</sup> See *id.*

<sup>81</sup> John George, *Genesis Selling Off 2 Dozen Skilled Nursing Facilities in Texas*, PHILA. BUS. J. (2018).

<sup>82</sup> See Holly K. Hacker & Sue Ambrose, *Texas’ Largest Nursing Home Operator Files for Bankruptcy, Sparking Concerns About Patients, Jobs*, DALLAS MORNING NEWS (Dec. 5, 2018), <https://www.dallasnews.com/business/business/2018/12/05/texas-largest-nursing-home-operatorfiles-bankruptcy-sparking-concerns-patients-jobs>.

<sup>83</sup> See Peter Whoriskey & Dan Keating, *Overdoses, Bedsores, Broken Bones: What Happened When a Private-Equity Firm Sought to Care for Society’s Most Vulnerable*, WASH. POST (Nov. 25, 2018) (After selling its properties to a real estate investment company, “HCR ManorCare had to make massive rent payments to its new landlord, and these, according to the company’s accounting, raised the company’s long-term financial obligations to \$6 billion.”)

<sup>84</sup> See Alex Spanko, *REITs Adopt Novel Approaches to Stay Relevant in Skilled Nursing*, SKILLED NURSING NEWS (June 3, 2018) (noting that “publicly traded REITs also played some role in the difficulties facing individual skilled nursing operators: In a world of changing reimbursements, staffing pressures, and regulatory scrutiny, the skilled nursing model has become increasingly difficult to reconcile with annual rent escalators and quarterly scrutiny from shareholders.”).

<sup>85</sup> George, *supra* note 82.

<sup>86</sup> Jon Chavez, *ProMedica, Welltower, Finalize Purchase of HCR ManorCare*, TOLEDO BLADE (July 27, 2018), <https://www.toledoblade.com/business/2018/07/26/ProMedica-Welltower-finalize-purchase-of-HCR-ManorCare/stories/20180726203>.

missed rent payments, which eventually sent ManorCare into Chapter 11 bankruptcy protection.”<sup>87</sup> Illustrating the nursing home sector’s precariousness, the acquiring company saw its bond rating downgraded significantly.<sup>88</sup>

In 2017, Kindred Healthcare—once one of the nation’s largest nursing home companies—sold all of its nursing homes.<sup>89</sup> Four that subsequently closed were located in Massachusetts.<sup>90</sup>

As was true for the small Pawhuska Nursing Home in rural Oklahoma, state funding pressures have not been limited to large, profit-oriented chains. In Illinois, for example, a 113-year-old, ninety-eight-bed

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<sup>87</sup> Alex Spanko, *S&P Downgrades ProMedica in Wake of ManorCare-Welltower Deal*, SKILLED NURSING NEWS (Aug. 15, 2018), <https://skillednursingnews.com/2018/08/sp-downgrades-promedica-wake-manorcare-welltower-deal/>. A threat to simply turn over the keys can be an effective negotiating tactic, as a REIT is unlikely to have any more success turning a profit than its provider tenant, and would not want empty buildings in its portfolio. That is effectively what HCR ManorCare did. See Tara Bannow, *HCR ManorCare Files for Bankruptcy, Proposes Ownership Transfer*, MODERN HEALTHCARE (Mar. 5, 2018), <https://www.modernhealthcare.com/article/20180305/NEWS/180309949> (“Struggling nursing home provider HCR ManorCare’s parent company filed for bankruptcy Sunday, and plans to shift ownership and leadership to its landlord, the real estate investment trust Quality Care Properties.”).

<sup>88</sup> See Spanko, *supra* note 88 (“The Toledo, Ohio-based hospital and skilled nursing chain now sits at BBB, down from the A+ rating ProMedica had maintained ahead of its blockbuster deal to acquire struggling nursing chain HCR ManorCare.”). More consolidation under REIT ownership is likely to occur under a new Medicare payment model. See Maggie Flynn, *PDPM Piles the Pressure on Smaller Skilled Nursing Operators*, SKILLED NURSING NEWS (Aug. 27, 2018), <https://skillednursingnews.com/2018/08/pdpm-piles-pressure-smaller-skilled-nursing-operators/> (Some are predicting “a wave of skilled nursing sales by smaller, mom-and-pop style operators.”). Consolidation can bring efficiencies of scale. It can, however, also bring operators who are not proficient at care, with systemic, as opposed to individual, facility failures. See, e.g., Whoriskey & Keating, *supra* note 84 (“Under the ownership of the Carlyle Group, one of the richest private-equity firms in the world, the ManorCare nursing-home chain struggled financially until it filed for bankruptcy in March.”); Kay Lazar, *Troubled Massachusetts Nursing Home Chain in ‘Dire’ Straits*, BOS. GLOBE (Sept. 1, 2018), <https://www.bostonglobe.com/metro/2018/08/31/troubled-massachusetts-nursing-home-chain-dire-straits-court-monitor-warns/WtywMujnoo7Fy2qYdlvdxL/story.html> (“With the company’s finances deteriorating, eight Synergy facilities have been placed into the hands of a court-appointed receiver, which is trying to untangle a labyrinth of unpaid bills for everything from medicine and food to cleaning services, court records show.”).

<sup>89</sup> See, e.g., Marty Stempniak, *Kindred Shareholders Approve Sale to Humana*, MCKNIGHT’S LONG-TERM CARE NEWS (Apr. 6, 2018), <https://www.mcknights.com/news/kindred-shareholders-approve-sale-to-humana/>.

<sup>90</sup> Shira Schoenberg, *Kindred Healthcare, Heritage Nursing to Collectively Close Five Massachusetts Nursing Homes, Leaving 600 to Find New Place to Live*, MASSLIVE (Dec. 5, 2017), [https://www.masslive.com/politics/index.ssf/2017/12/five\\_machusetts\\_nursing\\_hom.html](https://www.masslive.com/politics/index.ssf/2017/12/five_machusetts_nursing_hom.html).

nursing home closed in 2018 due to state inefficiency in processing Medicaid payments.<sup>91</sup> As the *State Journal-Register* reported:

For Pleasant Hill, a not-for-profit facility associated with the Church of the Brethren, waiting on \$2.3 million in Medicaid payments for residents whose applications remain pending — some as long as two to three years and some involving people who have died during the wait — has become too much of a burden.<sup>92</sup>

The delayed payments amounted to “44 percent of the nursing home’s annual spending.”<sup>93</sup>

Citing inadequate Medicaid payments that caused it to lose over \$1 million annually, a forty-five-year-old nonprofit nursing home in New Hampshire closed its doors in 2016.<sup>94</sup> This is particularly troubling considering New Hampshire has the nation’s second-oldest median age.<sup>95</sup> In 2018, the president and CEO of Catholic Charities New Hampshire wrote that “our 800 nursing home employees serve approximately 1,000 residents; of those, 60 to 78 percent are on Medicaid. Historically, we operate on a 1.5 to 2.5 percent margin. But last year we had a negative margin.”<sup>96</sup>

Nursing home providers in seemingly-progressive states are not immune from funding pressures. After winning a \$24 million Medicaid-recovery lawsuit, nursing homes in Rhode Island were threatened with the retribution of an 8.5 percent state budget cut in 2018, so they settled the lawsuit and instead agreed to “a 1.5 percent increase on July 1, and another 1 percent in October.”<sup>97</sup>

A 2017 RAND Corporation study found that “[a]mong persons age

<sup>91</sup> See Dean Olsen, *Medicaid Processing Backlog a Fatal Blow for Girard Nursing Home*, ST. J.-REG. (July 9, 2018), <https://www.sj-r.com/news/20180706/medicaid-processing-backlog-fatal-blow-for-girard-nursing-home>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> John P. Gregg, *Clough Center To Close*, VALLEY NEWS (June 16, 2016), <https://www.vnews.com/New-London-Hospital-to-Close-Clough-Nursing-Home-2888282>.

<sup>95</sup> See Press Release, U.S. Census Bureau, *The Nation’s Older Population Is Still Growing*, Census Bureau Reports (June 22, 2017) (noting that, nationally, “Residents age 65 and over grew from 35.0 million in 2000, to 49.2 million in 2016, accounting for 12.4 percent and 15.2 percent of the total population, respectively.”).

<sup>96</sup> Thomas E. Blonski, *A Troubling Future for New Hampshire’s Elderly?*, CONCORD MONITOR (Mar. 1, 2018), <https://www.concordmonitor.com/A-troubling-future-for-NH-elderly-15824078> (even charities cannot long afford to operate at a loss.).

<sup>97</sup> Katherine Gregg, *State, Nursing Homes Reach Potential Settlement in Medicaid Lawsuit*, PROVIDENCE J. (June 12, 2018), <https://www.providencejournal.com/news/20180612/state-nursing-homes-reach-potential-settlement-in-medicaid-lawsuit>.

57 to 61, 56 percent will stay in a nursing home at least one night during their lifetime.”<sup>98</sup> Michael Hurd, the study’s lead author, noted that due to the unviability of long-term care insurance, “people should be prepared to use the societally provided insurance, which is Medicaid.”<sup>99</sup>

But, will the facilities be there for them? According to one 2018 report, “The 31 largest metropolitan markets have 13,586 fewer nursing home beds now than in late 2005.”<sup>100</sup> Some states are trying to do better. In Maine and Massachusetts, in 2018, lawmakers voted to dramatically increase nursing home funding to afford better wages for caregivers.<sup>101</sup> In Maine, legislators even overcame a gubernatorial veto.<sup>102</sup> Following

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<sup>98</sup> Press Release, RAND Corp., Average American’s Risk of Needing Nursing Home Care is Higher Than Previously Estimated (Aug. 28, 2017), <https://www.rand.org/news/press/2017/08/28/index1.html>.

<sup>99</sup> *Id.*

<sup>100</sup> Paula Span, *In the Nursing Home, Empty Beds and Quiet Halls*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/health/nursing-homes-occupancy.html>. As the story notes:

For more than 40 years, Morningside Ministries operated a nursing home in San Antonio, caring for as many as 113 elderly residents. The facility, called Chandler Estate, added a small independent living building in the 1980s and an even smaller assisted living center in the 90s, all on the same four-acre campus. The whole complex stands empty now.

*Id.*

<sup>101</sup> See Brendan Williams, *NH Needs to Invest in Care for Seniors*, PORTSMOUTH HERALD (July 11, 2018), <https://www.seacoastonline.com/news/20180711/nh-needs-to-invest-in-care-for-seniors>. In Massachusetts, the Legislature adopted a budget specifying that “not less than \$38,300,000 shall be expended to fund a rate add-on for wages, shift differentials, bonuses, benefits and related employee costs paid to direct care staff of nursing homes; provided further, that MassHealth regulations for this rate add-on shall prioritize spending on hourly wage increases, shift differentials or bonuses paid to certified nurses’ aides and housekeeping, laundry, dietary and activities staff[.]” See 2018 Mass. Acts ch. 154 § 4000-0641.

<sup>102</sup> See Mal Leary, *LePage Vetoes More than 20 Bills, Including Funding for Prison and Direct Care Workers*, ME. PUB. (July 2, 2018), <http://www.mainepublic.org/post/lepage-vetoes-more-20-bills-including-funding-prison-and-direct-care-workers>. The Maine legislators approved provided one-time additional funding for wage increases for workers in long-term care facilities of “[a]n amount equal to 10% of allowable wages and associated benefits and taxes. . . .” 2018 Me. Laws ch. 460 § B-3(1), <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0653&item=3&num=128>. Going forward, the law also provides “an inflation adjustment for a cost-of-living percentage change in nursing facility reimbursement each year in accordance with the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index medical care services index.” *Id.* at § B-1. And yet even Maine, with the nation’s oldest population, saw a record number of nursing home closures in 2018. See Jackie Farwell, *Record Number of Maine Nursing Homes Closed This Year, Displacing Hundreds*, BANGOR DAILY NEWS (Dec. 12, 2018), <https://bangordailynews.com/2018/12/12/maine-focus/record-number-of-maine-nursing-homes-closed-this-year-displacing-hundreds/> (“The personal toll of the closures on the elderly and their families is acute, said Trish Thorsen, program

her 2018 re-election, Oregon Governor Kate Brown, a Democrat, proposed a ten percent Medicaid funding increase for long-term care facilities.<sup>103</sup> These are very positive efforts. However, they not only accentuate the disparate treatment of nursing home care by states, but they may not be sustainable in the event of an economic downturn—when Medicaid is often on the chopping block. In other words, a *federal* funding strategy is still needed.

### *B. Assisted Living Facilities*

According to the National Center for Assisted Living, “There are 30,200 assisted living communities with 1 million licensed beds in the United States today.”<sup>104</sup>

Oregon was the first state, in 1981, to apply for a federal waiver to serve Medicaid beneficiaries in long-term care settings other than nursing homes, and it is credited with having the first assisted living facility.<sup>105</sup> An *Oregonian* article identified the “trade-offs” of assisted living: “It’s less regulated than nursing homes, which lets residents be more independent about where they move and what they do. But there’s also less safety regulation and checks that people are having good health outcomes.”<sup>106</sup>

The growth of the sector can lead to challenges. In 2014,

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manager for the Maine Long-Term Care Ombudsman Program, which advocates for nursing home residents.”). Rural facilities are particularly vulnerable. *See id.* In South Dakota, it was reported in December 2018 that “[t]he health and stability of some of South Dakota’s most vulnerable residents are being threatened by a wave of closures of long-term care facilities across the state.” Bart Pfankuch, *Wave of Nursing Home Closures Hitting Small South Dakota Communities*, S.D. NEWS WATCH (Dec. 12, 2018), <https://www.sdnewswatch.org/stories/wave-of-nursing-home-closures-hitting-small-south-dakota-communities/> (“Nursing homes are sometimes the biggest employer in small towns and employees are typically laid off upon closure. Residents of rural nursing homes tend to be locals and uprooting them from their long-term homes is physically and emotionally traumatic for the patients and their loved ones.”).

<sup>103</sup> See Hillary Borrud, *Top Takeaways from Gov. Kate Brown’s \$23.6 Billion Budget Proposal*, OREGONIAN (Nov. 29, 2018), <https://www.oregonlive.com/politics/2018/11/top-takeaways-from-gov-kate-browns-236-billion-budget-proposal.html>.

<sup>104</sup> See NAT’L CTR. FOR ASSISTED LIVING, <https://www.ahcancal.org/ncal/facts/Pages/Communities.aspx> (last visited Mar. 4, 2019).

<sup>105</sup> See Lynne Terry, *Winners and Losers as Oregon’s Population Ages*, OR. BUS. (July 9, 2018), <https://www.oregonbusiness.com/article/real-estate/item/18395-boomer-s-future>.

<sup>106</sup> See Andy Dworkin, *Oregon Among National Leaders in Number of Assisted Living Facilities*, OREGONIAN (Jan. 5, 2010), [https://www.oregonlive.com/news/index.ssf/2010/01/oregon\\_among\\_national\\_leaders.html](https://www.oregonlive.com/news/index.ssf/2010/01/oregon_among_national_leaders.html).

Brookdale Senior Living acquired Emeritus Corporation for \$2.8 billion, expanding its footprint to 1,100 assisted living facilities.<sup>107</sup> In August 2018, amidst news that Brookdale was selling twenty-seven facilities, its stock had reportedly fallen to \$8.19 per share from over \$38 per share in 2015.<sup>108</sup> Brookdale was not reported at risk of insolvency,<sup>109</sup> but its challenges as a sector leader show that in long-term care, the expression “[i]f you build it, he will come”<sup>110</sup> is not a guaranteed business proposition.<sup>111</sup>

Unlike nursing homes, assisted living facilities may find it possible, even preferable, to operate without Medicaid contracts.<sup>112</sup> Since this does not allow residents to age-in-place upon spending down their resources, it can lead to some troubling stories:

Assisted Living Concepts Inc. drew attention within its first year as a public company when it began forcing people such as Gladys Dixon, nearly blind and a few days shy of 103 years old, to leave its assisted living centers.

Dixon was among those whose care was paid for by Medicaid, which pays much lower rates than other residents pay. At the time, Assisted Living Concepts, which went public in 2006, planned to increase profits by accepting only so-called private-pay residents.<sup>113</sup>

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<sup>107</sup> Eleanor Kennedy, *\$2.8-billion Brookdale-Emeritus Merger Closes*, NASHVILLE BUS. J. (July 31, 2014), <https://www.bizjournals.com/nashville/blog/health-care/2014/07/2-8-billion-brookdale-emeritus-merger-closes.html>.

<sup>108</sup> John Stinnett, *Brookdale’s CEO on What’s Fueling the Sale of 28 Facilities*, NASHVILLE BUS. J. (Aug. 20, 2018), <https://www.bizjournals.com/nashville/news/2018/08/20/brookdales-ceo-on-whats-fueling-the-sale-of-28.html>.

<sup>109</sup> Instead, some investors have pressed the company to sell some of its valuable real estate. See Joel Stinnett, *Activist Investor Renews Criticism of Brookdale Senior Living*, NASHVILLE BUS. J. (Aug. 10, 2018), <https://www.bizjournals.com/nashville/news/2018/08/10/activist-investor-renews-criticism-of-brookdale.html>.

<sup>110</sup> See *Field of Dreams Quotes*, IMDB <https://www.imdb.com/title/tt0097351/quotes> (last visited Jan. 25, 2018).

<sup>111</sup> Building booms can lead to overcapacity bubbles, which is why nursing home providers tend to favor certificate of need and bed moratorium laws. In New Hampshire, one assisted living facility declared bankruptcy with a “\$16.6 million debt and losing money daily.” See Bob Sanders, *Financial Woes Threaten Seacoast Assisted Living Facility*, N.H. BUS. REV. (May 2, 2017), <https://www.nhbr.com/May-12-2017/Financial-woes-threaten-Seacoast-assisted-living-facility/>.

<sup>112</sup> In Arkansas, for example, assisted living facilities faced a possible 22% Medicaid cut going into 2019. See Andy Davis, *Proposal to Cut Aid for Elderly, Disabled Pulled; State Officials Will Study Plan for 8,800 ARChoices Clients*, ARK. DEMOCRAT GAZETTE (Dec. 19, 2018), <https://www.arkansasonline.com/news/2018/dec/19/proposal-to-cut-aid-for-elderly-disable-1/>.

<sup>113</sup> Guy Boulton, *Assisted Living Concepts Purchase Completed*, MILWAUKEE J. SENTINEL (July 13, 2013), <http://archive.jsonline.com/business/assisted-living-concepts-purchase-completed-b9953271z1-215347351.html>.

Yet there can be no requirement that facilities take residents that cause them to operate at a loss. In New York City, for example, the Medicaid assisted living payment can be as low as \$75.85 per day.<sup>114</sup>

In those cases where there *are* Medicaid residents, there has been publicity as to what the federal government gets in exchange for Medicaid payments to assisted living facilities, given the patchwork of state regulations and laws.<sup>115</sup> In 2018, the *New York Times* reported, “Federal investigators say they have found huge gaps in the regulation of assisted living facilities, a shortfall that they say has potentially jeopardized the care of hundreds of thousands of people served by the booming industry.”<sup>116</sup> The article also noted that “[s]tates reported spending more than \$10 billion a year in federal and state funds for assisted living services for more than 330,000 Medicaid beneficiaries, an average of more than \$30,000 a person, the Government Accountability Office found in a survey of states.”<sup>117</sup>

Yet there was far less to that General Accountability Office (GAO) report than media accounts, as it was based upon 2014 data and involved an admittedly “nongeneralizable sample of three states: Georgia, Nebraska, and Wisconsin.”<sup>118</sup> In 2014, a new CMS rule was adopted, requiring greater reporting by states.<sup>119</sup> CMS needs to enforce that expectation. The GAO found that even accessing Medicaid assisted living was a challenge, reporting common factors that states identified:

- (1) [T]he number of assisted living facilities willing to accept Medicaid beneficiaries (13 states or 27 percent of the 48 states);

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<sup>114</sup> See *January 1, 2018 Assisted Living Program Minimum Wage Rate Schedule*, N.Y. DEP’T OF HEALTH (Apr. 2018), [https://www.health.ny.gov/facilities/long\\_term\\_care/reimbursement/alp/2018-01-01\\_alp\\_min\\_wage\\_rates.htm](https://www.health.ny.gov/facilities/long_term_care/reimbursement/alp/2018-01-01_alp_min_wage_rates.htm) (Schedule for “PA = REDUCED PHYSICAL FUNCTIONING A”). A similarly-classed resident’s care would only be worth \$44.33 a day to the state in upstate rural New York. *Id.*

<sup>115</sup> Robert Pear, *U.S. Pays Billions for ‘Assisted Living,’ but What Does It Get?*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/us/politics/assisted-living-gaps.html>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-179, MEDICAID ASSISTED LIVING SERVICES: IMPROVED FEDERAL OVERSIGHT OF BENEFICIARY HEALTH AND WELFARE IS NEEDED 5 (2018).

<sup>119</sup> See Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers, 79 Fed. Reg. 2947, 2969 (Jan. 16, 2014) (“While we are not changing the existing quality assurances through this rule, we clarified that states must continue to assure health and welfare of all participants when target groups are combined under one waiver, and assure that they have the mechanisms in place to demonstrate compliance with that assurance.”).

- (2) program enrollment caps (9 states or 19 percent of the 48 states);
- (3) beneficiaries' inability to pay for assisted living facility room and board (9 states or 19 percent of the 48 states), which Medicaid typically does not cover; and
- (4) low rates the state Medicaid program paid assisted living facilities (8 states or 17 percent of the 48 states).<sup>120</sup>

Given the cost of the federal regulatory regime that applies to nursing homes, assisted living should remain state-regulated. Too often in long-term care, the impetus for regulation is driven by the outlier as opposed to an empirical basis.<sup>121</sup> States are getting the benefit of their bargain, such as New Hampshire, where 24/7 care, meals, and housing in an assisted living facility cost the state a daily Medicaid rate of just \$50.96.<sup>122</sup> That is less than the cost of a cheap motel.<sup>123</sup>

Moreover, the scope of care that assisted living facilities can provide varies widely by state. In Washington, where the licensure of such facilities dates to 1957, facilities may not admit, or retain, "any aged person requiring nursing or medical care of a type provided by" a nursing home, except when registered nurses are available, and upon a doctor's order that a supervised medication service is needed, it may be provided. Whereas, under California law:

The Legislature hereby finds and declares that in order to protect the health and safety of elders in care at residential care facilities for the elderly, appropriate oversight and regulation of residential care facilities for the elderly requires regular, periodic inspections of these facilities in addition to investigations in response to complaints. It is the intent of the Legislature to increase the frequency of unannounced inspections.<sup>124</sup>

In Texas, "inspection and survey personnel will perform inspections and surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits from time to time as they deem appropriate or as required for carrying out the responsibilities of

<sup>120</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 122, at 40.

<sup>121</sup> The prevalence of staph infections, like methicillin-resistant *Staphylococcus aureus* (MRSA), have not led to a strict, overarching federal regulatory regime for hospitals –just Medicare reimbursement penalties. *See, e.g.*, Anthony Sannazzaro, *MRSA: The Superbug Poised to Cost Hospitals Super Sums*, INFECTION CONTROL TODAY (Dec. 29, 2015), <https://www.infectioncontroltoday.com/bacterial/mrsa-superbug-poised-cost-hospitals-super-sums>.

<sup>122</sup> *See* Williams, *supra* note 102 ("At least one Portsmouth dog-sitting service charges more overnight than the \$50.96 the state is willing to reimburse for assisted living care.").

<sup>123</sup> *Id.*

<sup>124</sup> CAL. HEALTH & SAFETY CODE § 1569.331 (2018).

licensing.”<sup>125</sup>

These types of oversight standards should be adopted in all states. Yet oversight alone will not be enough to make assisted living a reliable option for Medicaid beneficiaries—only funding can accomplish this goal. Policymakers who are only focused on nursing home care and home care may overlook assisted living, which provides a social atmosphere in a residential setting.

Some states may have more exotic, small facility-based care options that are beyond the reach of this article. In Washington state, adult family homes have been described as “a growing, lightly regulated housing option for the state’s aged and frail. DSHS licenses residential homeowners to rent out bedrooms and provide care for up to six residents.”<sup>126</sup> In 2010, there was a move to increase their licensure fee tenfold, from \$100 per bed annually to \$1,000, so that, like assisted living facilities and nursing homes, adult family homes would pay for oversight.<sup>127</sup> The impetus behind this movement came partly from a *Seattle Times* investigation that “uncovered myriad accounts of inadequately trained caregivers who imprisoned the elderly in their rooms, roped residents into beds at night and drugged others into submission.”<sup>128</sup> The providers successfully resisted any increase in licensure fees.<sup>129</sup> Eight years later, the fee, at \$225 per bed through June 30, 2020,<sup>130</sup> falls far short of the regulatory cost identified in 2010.<sup>131</sup> This is the only class of facility-based care providers in the United States that collectively bargain with a state as if unionized.<sup>132</sup>

### C. Home Care

According to the AARP’s 2018 Home and Community Preferences Survey, more than 70% of those 50-and-older would prefer to remain in

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<sup>125</sup> TEX. ADMIN. CODE § 92.81 (2018).

<sup>126</sup> Michael J. Berens, *Adult-Home Owners Avoid Big Fee Increase*, SEATTLE TIMES (Apr. 8, 2015), <https://www.seattletimes.com/seattle-news/special-reports/adult-home-owners-avoid-big-fee-increase/>.

<sup>127</sup> *See id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 2018 Wash. Sess. Laws ch. 299 § 205(b)(i). A question with such very small-scale facilities is whether mandatory reporting of abuse or neglect will actually occur; i.e., will Mom blow the whistle on Pop?

<sup>131</sup> *See Berens, supra* note 131.

<sup>132</sup> *See WASH. REV. CODE* § 41.56.029(1) (2018) (“Solely for the purposes of collective bargaining . . . the governor is the public employer of adult family home providers who, solely for the purposes of collective bargaining, are public employees.”).

their communities and in their personal residences.<sup>133</sup>

In-home care offers these promises to those whose physical or mental impairment does not require facility-based care.<sup>134</sup> Oregon law, for example, requires the state to make health and social services available that “[a]llow the older citizen and citizen with a disability to live independently at home or with others as long as the citizen desires without requiring inappropriate or premature institutionalization.”<sup>135</sup>

The Paraprofessional Healthcare Institute (PHI) reports that there are “over 2 million home care workers” as compared to “600,000 nursing assistants employed in nursing homes. . . .”<sup>136</sup> PMI estimates that between 2016 and 2026, home care will add over 1 million jobs, “which represents the largest growth of any job sector in the country.”<sup>137</sup>

Although, this is a challenged workforce. As of 2018, the median wage was \$11.03 per hour.<sup>138</sup> Accordingly, that report found that “[o]ne in five home care workers lives below the federal poverty line (FPL) and over half rely on some form of public assistance.”<sup>139</sup> Almost 90 percent are women, and 30 percent are immigrants.<sup>140</sup>

The *New York Times* noted, “providing care for older people, in their homes or in facilities, has become the classic example of a job native-born Americans would rather not take.”<sup>141</sup> Thus, immigration restrictions threaten to make things worse.<sup>142</sup> A 2017 *POLITICO* article warned that “[o]ne of the biggest future crises in U.S. health care is about to collide with the hottest political issue of the Trump era: immigration.”<sup>143</sup> The

<sup>133</sup> Joanne Binette & Kerri Vasold, *2018 Home and Community Preferences: A National Survey of Adults Age 18-Plus*, AARP (Aug. 2018), <https://www.aarp.org/research/topics/community/info-2018/2018-home-community-preference.html>.

<sup>134</sup> See, e.g., *What is the Difference Between In-Home Care and Home Health Care?*, WINSTON-SALEM J. (Dec. 31, 2018) (“You might consider hiring in-home care if you or a loved one needs assistance with activities of daily living, does not drive or have access to transportation or live alone and are at risk for social isolation.”).

<sup>135</sup> OR. REV. STAT. § 410.020(3)(a) (2018).

<sup>136</sup> *Understanding the Direct Care Workforce*, PHI, <https://phinational.org/policy-research/key-facts-faq/> (last visited Dec. 4, 2018).

<sup>137</sup> *Id.*

<sup>138</sup> Campbell, *supra* note 46 at 2.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 3.

<sup>141</sup> Paula Span, *If Immigrants Are Pushed Out, Who Will Care for the Elderly?*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/health/illegal-immigrants-caregivers.html>.

<sup>142</sup> See *id.*

<sup>143</sup> Ted Hesson, *Why Baby Boomers Need Immigrants*, POLITICO (Oct. 25, 2017), <https://www.politico.com/agenda/story/2017/10/25/immigrants-caretaker->

article noted that “[t]here’s a reason foreign-born workers take so many home health jobs: they’re low-paid, low-skilled and increasingly plentiful. Barriers to entry are low; a high school degree is not usually a requirement and neither is previous work experience.”<sup>144</sup> Yet, “[o]ther low-wage workplaces (McDonald’s, for instance) offer much better benefits, even tuition reimbursement[.]”<sup>145</sup>

Not only is our future home care workforce at risk, but our current workforce is as well. According to a 2018 *Washington Post* article, 59,000 Haitians live in the United States under temporary protected status (TPS), a humanitarian program that has given them permission to live and work in this country since the earthquake. Many are nursing assistants, home health aides and personal care attendants—the trio of jobs that often defines direct-care workers.<sup>146</sup> PHI estimated that the direct care workforce also included 69,800 “non-U.S. citizens from Mexico.”<sup>147</sup>

Today all of these workers face the real prospect of deportation. The *Post* reported:

The Trump administration’s immigration restrictions may exacerbate a serious shortage of direct-care workers, warns Paul Osterman, a professor at the Massachusetts Institute of Technology’s Sloan School of Management. He forecasts a national shortfall of 151,000 workers by 2030 and of 355,000 workers by 2040. If immigrants lose their work permits, the gap would widen further.<sup>148</sup>

Indeed, the number of immigrant caregivers might be higher than reported, as the *New York Times* noted: “In the so-called gray market, where consumers hire home care workers directly and often pay them under the table, the proportion is likely far higher.”<sup>149</sup>

What is the alternative for those desperate for care? Gone are the days of parents expecting their children to provide care. The *Minneapolis Star Tribune* reported, “Family sizes have been shrinking for decades, which means there will be fewer adults to care for older relatives in the

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workforce-000556.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Melissa Bailey, *As Trump Targets Immigrants, Elderly and Others Brace to Lose Caregivers*, WASH. POST (Mar. 24, 2018), [https://www.washingtonpost.com/national/health-science/as-trump-targets-immigrants-elderly-and-others-brace-to-lose-caregivers/2018/03/24/72d5a0d0-2d3e-11e8-8ad6-fbc50284fcstory.html?utm\\_term=.828236b697](https://www.washingtonpost.com/national/health-science/as-trump-targets-immigrants-elderly-and-others-brace-to-lose-caregivers/2018/03/24/72d5a0d0-2d3e-11e8-8ad6-fbc50284fcstory.html?utm_term=.828236b697).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Span, *supra* note 147.

years ahead. By 2030, the ratio of informal caregivers to those in most need of care will be at 4 to 1, down from a peak of 7 to 1 in 2010.”<sup>150</sup> The article further noted, “Family caregivers have been described as America’s other Social Security. The nation’s health system would go broke if it had to pay for their work, valued at \$470 billion a year in free care, according to AARP.”<sup>151</sup>

Standards for home care can vary widely. Per citizen’s initiative, Washington state requires the most hours of “entry-level training” (75 hours) for those providing home care to non-family members.<sup>152</sup> However, Washington is also on a path to provide living wages to home care workers. Under their union contract with the state, each Medicaid home care worker (or “individual provider”) makes no less than \$15 an hour and receives health care benefits.<sup>153</sup>

By contrast, Missouri cut \$50 million from in-home care in 2017.<sup>154</sup> “[A]t least 7,844 disabled Missourians” were at risk, according to the House Budget chair.<sup>155</sup> And it was not as if home care in Missouri was prospering before. In 2016, Republican legislators overrode a gubernatorial veto and, through legislation, rejected the governor’s plan to raise Medicaid home care workers’ wages to between \$8.50 and \$10.15 per hour.<sup>156</sup>

Too often, the plight of home care workers is invisible. Ai-jen Poo, executive director of the National Domestic Workers Alliance, stated:

This is a workforce where the private home is their workplace. So you could go into any neighborhood or apartment building and not know which of these homes are also workplaces. There’s no list anywhere. They’re not registered anywhere. There’s no other coworkers. You’re mostly isolated and alone. And there’s

<sup>150</sup> Jackie Crosby, *‘Invisible Workforce’ of Caregivers is Wearing Out as Boomers Age*, MINNEAPOLIS STAR TRIB. (June 3, 2018), <http://www.startribune.com/invisible-workforce-of-caregivers-is-wearing-out/483250981/>.

<sup>151</sup> *Id.*

<sup>152</sup> WASH. REV. CODE § 74.39A.074(1)(b).

<sup>153</sup> See *Collective Bargaining Agreement, State of Washington and Service Employee. International Union 775, 2017-2019* (2017), [http://seiu775.org/files/2017/09/Homecare17\\_19WebReady-signature-page-w-mou.pdf](http://seiu775.org/files/2017/09/Homecare17_19WebReady-signature-page-w-mou.pdf).

<sup>154</sup> Samantha Liss, *After Missouri Cuts Funding for the Disabled, Some Fear They May be Forced into Nursing Homes*, ST. LOUIS POST-DISPATCH (Aug. 16, 2018), [https://www.stltoday.com/news/local/govt-and-politics/after-missouri-cuts-funding-for-the-disabled-some-fear-they/article\\_76b2dac9-76ed-5545-9689-e87650d4a3ab.html](https://www.stltoday.com/news/local/govt-and-politics/after-missouri-cuts-funding-for-the-disabled-some-fear-they/article_76b2dac9-76ed-5545-9689-e87650d4a3ab.html).

<sup>155</sup> *Id.*

<sup>156</sup> Jack Suntrup, *Home Health Care Workers Likely Won’t See Raise After Lawmakers Override Nixon Veto*, ST. LOUIS POST-DISPATCH (May 3, 2016), [https://www.stltoday.com/news/local/govt-and-politics/home-health-care-workers-likely-won-t-see-raise-after/article\\_db94402f-0ee6-5405-9fe4-7717616a2de6.html](https://www.stltoday.com/news/local/govt-and-politics/home-health-care-workers-likely-won-t-see-raise-after/article_db94402f-0ee6-5405-9fe4-7717616a2de6.html).

certainly no HR department or anything like that.<sup>157</sup>

This invisibility, coupled with the fact that the workforce is predominantly non-white women,<sup>158</sup> caring for an elderly population that is largely women, cannot be factored out in explaining home care's funding neglect.<sup>159</sup>

### III. CONCLUSION

As U.S. Rep. Debbie Dingell (D., Michigan) has explained, those contemplating long-term care will often “encounter a fragmented system with multiple programs intended to support their needs and the needs of their loved ones, each of which has its own complicated rules and regulations.”<sup>160</sup> She noted that “[t]he average American may think Medicare provides for long-term care,” but the reality is that it covers very little.<sup>161</sup>

In Maine, the Senate Democratic leader who pushed for higher wages for nursing home workers stated, “In Maine, we talk a lot about taking care of our seniors but words only go so far.”<sup>162</sup> He could have been referring to the nation as a whole.

Rather than have long-term care providers in the states ride a roller

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<sup>157</sup> Ivette Feliciano & Corinne Segal, ‘You’re Mostly Isolated and Alone.’ *Why Some Domestic Workers are Vulnerable to Exploitation*, PBS (Aug. 12, 2018), <https://www.pbs.org/newshour/nation/ai-jen-poo-domestic-workers-exploitation>.

<sup>158</sup> See Campbell, *supra* note 46 at 3 (only 40% of home care workers are white). The roots of U.S. home care trace back to slavery, as one scholar notes. See Rebecca Donovan, *Home Care Work: A Legacy of Slavery in U.S. Health Care*, AFFILIA at 33-44 (Sept. 1, 1987) (“The specific job tasks of the home attendant or home health aide (shopping, cleaning, and cooking) are the same household tasks once performed by black women as slaves and later as domestic servants in private households.”).

<sup>159</sup> The Trump Administration is making it harder for home care workers to organize into unions. See, e.g., Michael Hiltzik, *Targeting Home Healthcare Workers, the Trump Administration Opens Another Front in its War on Public Employees*, L.A. TIMES (July 30, 2018), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-home-health-20180730-story.html> (“Medicaid authorities have launched a new attack on unions serving home healthcare workers . . . aimed transparently at depriving their unions of financial resources.”).

<sup>160</sup> Debbie Dingell, *Aging with Dignity Out of Reach for Many in America*, DETROIT FREE PRESS (July 11, 2015), <https://www.freep.com/story/opinion/contributors/2015/07/10/retirement-long-term-care/29998343/>.

<sup>161</sup> *Id.*; see *Skilled Nursing Facility (SNF) Care*, MEDICARE.GOV, <https://www.medicare.gov/coverage/skilled-nursing-facility-care.html> (last visited Mar. 4, 2019) (If you meet “the 3-day inpatient hospital stay requirement” and are discharged from a hospital, Medicare will cover a nursing home stay for up to 100 days – paying in full for 20 days, and in part for up to 80 days thereafter.).

<sup>162</sup> Press Release, Me. Sen. Troy Jackson, Budget Committee Unanimously Votes to Fund Jackson Nursing Home Bill (June 12, 2018), <http://www.mainesenate.org/budget-committee-unanimously-votes-to-fund-jackson-nursing-home-bill/>.

coaster of funding uncertainty, lurching from one existential crisis to the next, it makes more sense for the federal government to have a funding strategy that recognizes Medicaid has become de facto long-term care insurance.<sup>163</sup>

The Commission on Long-Term Care reported in 2013 that “[e]xpanded market penetration of private LTC insurance has been limited by the cost of coverage and medical underwriting, and is further hampered today by insurers reassessing the market due to unforeseen demographic and investment conditions.”<sup>164</sup> Matters have not improved since.<sup>165</sup>

Absent a private sector fix, the answer would seem to be one of the scenarios that the Commission shared: a comprehensive Medicare benefit for long-term services and supports (LTSS) “financed through a combination of an increase to the current Medicare payroll tax and the creation of a Part A premium.”<sup>166</sup> Under this guarantee:

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<sup>163</sup> See 42 U.S.C. § 1396d(y)(1) (2018) (The federal government will pay no less than 90% of the state costs of Medicaid expansion.). And yet it pays as little as 50% of long-term care Medicaid costs in many states. See 42 U.S.C. 1396d(b) (“[T]he Federal medical assistance percentage shall in no case be less than 50 per centum”); see also Williams, *supra* note 14. This incongruity shows the marginalization of “traditional” Medicaid.

<sup>164</sup> See U.S. SENATE COMM’N ON LONG-TERM CARE, *supra* note 10, at 67.

<sup>165</sup> See, e.g., Brendan Williams, *The Truth Behind Long-Term Care Insurance*, MCKNIGHT’S LONG-TERM CARE NEWS (July 6, 2018), <https://www.mcknights.com/guest-columns/the-truth-behind-long-term-care-insurance/article/779005/> (“The long-term care insurance market should be our canary in the coalmine. No longer can we delude ourselves into thinking private sector solutions alone can avert a demographic disaster.”).

<sup>166</sup> See U.S. SENATE COMM’N ON LONG-TERM CARE, *supra* note 10, at 67. An effort to fund a long-term care benefit through a payroll tax was introduced in the Washington Legislature in 2017. See Ron Lieber, *One State’s Quest to Introduce Long-Term Care Benefits*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/your-money/washington-state-long-term-care.html> (noting that “[a]s the need to finalize the legislation approached, AARP, citing various unanswered questions, came out against it.”). The idea had some editorial support. See Editorial, *Use Payroll Tax to Set Up Long-Term Care Benefit*, EVERETT HERALD (Feb. 15, 2017), <https://www.heraldnet.com/opinion/editorial-use-payroll-tax-to-set-up-long-term-care-benefit/> (“Some will balk at seeing another deduction from their paychecks, but providing for our own long-term care is a responsibility we owe to our children and one that we should no longer avoid.”). The author proposed such a tax in 2011. See Brendan Williams, *Schools vs. Elder Care*, EVERETT HERALD (July 10, 2011), <https://www.heraldnet.com/opinion/schools-vs-elder-care/> (“Call it a ‘half-cent solution.’ A payroll tax of .5% of earnings, split evenly between employers and employees (as the 2.9% Medicare Part A tax is) would generate more than \$600 million a year for long-term care.”). The effort was being renewed in 2019. See Jerry Reilly, *The state and its citizens both need lawmakers to pass the Long-Term Care Trust Act*, OLYMPIAN (Jan. 22, 2019), <https://www.theolympian.com/opinion/op-ed/article224917090.html>. Yet, while states can be forgiven for doing their utmost to avert a demographic disaster, a

Qualifying individuals would be eligible for reasonable and necessary LTSS services that would include: Skilled nursing facility care or daily skilled care; home health care without the need for a skilled service; personal care attendant services; care management and coordination; adult day center services; respite care options to support family or other volunteer caregiver; outpatient therapies; other reasonable and necessary services.<sup>167</sup>

This was not the first time a bipartisan commission had recommended such action. In September 1990, the “Pepper Commission,” or Bipartisan Commission on Comprehensive Health Care, made its own report to Congress that looked holistically at health care reform needs and included long-term care.<sup>168</sup> It recommended “social insurance for home and community-based care and for the first three months of nursing home care, for all Americans.”<sup>169</sup> Under that system, “[p]eople who need nursing home care for short periods would have their resources preserved intact to return home.”<sup>170</sup> Recognizing the “urgent needs of the currently disabled and their families” the Commission recommended “that the plan be put into place a step at a time over a four-year period.”<sup>171</sup>

Policymakers continue to discuss a single-payer “Medicare for All” approach to basic health care, without reference to long-term care.<sup>172</sup>

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*national* crisis really requires a *national* strategy, rather than placing the onus upon states. In Maine, Question 1 before the voters in 2018 would have funded a “Universal Home Care Program” by imposing “a 3.8 percent tax on income and wages over the maximum annual wage amount subject to Social Security taxes, which is now \$128,400.” Michael Shepherd, *Following the Money on Maine’s Home Care Ballot Question*, BANGOR DAILY NEWS (Sept. 17, 2018), <https://bangordailynews.com/2018/09/17/politics/following-the-money-on-maines-home-care-ballot-question/>. The measure failed overwhelmingly. See J. Craig Anderson, *Question 1 Proposal for Tax-Funded Home Care Headed for Defeat*, PORTLAND PRESS HERALD (Nov. 7, 2018), <https://www.pressherald.com/2018/11/06/question-1-appears-headed-for-defeat-in-early-returns/>.

<sup>167</sup> *Id.*

<sup>168</sup> S. REP. NO. 101–114 (1990).

<sup>169</sup> *Id.* at 14.

<sup>170</sup> *Id.* at 15.

<sup>171</sup> *Id.*

<sup>172</sup> Chris Farrell, *Could This Idea Help Fix America’s Shortage of Home Care Workers?*, FORBES (Aug. 15, 2017), <https://www.forbes.com/sites/nextavenue/2017/08/15/could-this-idea-help-fix-americas-shortage-of-home-care-workers/> (MIT Professor Osterman has been quoted stating: “Long-term care is absolutely the stepchild of health care on multiple dimensions.”). Policymakers already distracted by ACA debate now also must contend with the opioid crisis. See, e.g., German Lopez, *We’re Failing in the Opioid Crisis. A New Study Shows a More Serious Approach Would Save Lives.*, VOX (Aug. 23, 2018), <https://www.vox.com/policy-and-politics/2018/8/23/17769392/opioid-epidemic-drug-overdose-death-study> (“The opioid epidemic is the deadliest drug overdose crisis in US history — on track

However, it is time that lawmakers refocus their attention on ensuring that Medicare better serves the comprehensive health care needs of the elderly population that it was originally intended to serve.<sup>173</sup> Otherwise, states will flounder in meeting Medicaid demand.

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to kill more people over the next decade than currently live in entire American cities like Miami or Baltimore.”). For policymakers who are reactive, it is easier to focus on the crisis at hand (and their next election), rather than look ahead to the future.

<sup>173</sup> Howard Gleckman, *Americans Are Baffled by Long-Term Care Financing, but Want Medicare to Pay For It*, FORBES (May 30, 2017), <https://www.forbes.com/sites/howardgleckman/2017/05/30/americans-are-baffled-by-long-term-care-financing-but-want-medicare-to-pay-for-it/> (“While a majority of Americans incorrectly think that the current Medicare program pays for long-term care, a growing majority also thinks the program *should* provide such a benefit.”); see also Emily Swanson, *Poll: Older Americans Want Medicare-Covered Long-Term Care*, AP (May 25, 2017), <http://www.apnorc.org/news-media/Pages/Poll-Older-Americans-want-Medicare-covered-long-term-care.aspx> (“Seventy percent of older Americans say they favor a government-administered long-term care insurance program, up from 53 percent who said so a year ago.”).