Journal of Law and Policy

Volume 30 | Issue 2 Article 4

6-1-2022

America’s Constant Crisis of Care: The Case for Passing a National Direct Care Ratio for Nursing Homes

Marissa Espinoza

Follow this and additional works at: https://brooklynworks.brooklaw.edu/jlp

Part of the Health Law and Policy Commons, Insurance Law Commons, Law and Society Commons, Legislation Commons, Nonprofit Organizations Law Commons, and the Social Welfare Law Commons

Recommended Citation
Marissa Espinoza, *America’s Constant Crisis of Care: The Case for Passing a National Direct Care Ratio for Nursing Homes*, 30 J. L. & Pol'y 456 (2022).
Available at: https://brooklynworks.brooklaw.edu/jlp/vol30/iss2/4

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

AMERICA'S CONSTANT CRISIS OF CARE: THE CASE FOR PASSING A NATIONAL DIRECT CARE RATIO FOR NURSING HOMES

Marissa Espinoza[*]

"The ancient Greeks judged whether other nations were civilized by the quality of treatment they provided for their elderly. But institutionalized neglect and abuse of old people and profiteering from their misery have become a hallmark of American life and a force that threatens to tear apart the very fabric of this society."[1]

For decades, the conditions in America's nursing homes have been the subject of bombshell media reporting, governmental investigations, and public outrage. Longstanding issues—such as chronic staffing shortages and inadequate infection control measures—were laid bare as the COVID-19 pandemic tore through nursing homes, exposing society's most vulnerable populations—the elderly and the sick—to appalling living conditions. Amid horrifying media reports documenting life inside nursing homes, and in response to mounting public outrage, legislators sprang into action. The most aggressive policy proposed was a direct care ratio, which caps the profits that nursing home owners can extract from

---

[*] J.D. Candidate, Brooklyn Law School, 2023; B.A., Hofstra University, 2015. Thank you to my faculty advisor Professor Frank Pasquale for your invaluable mentorship and guidance during the research and writing process. Thank you to my former boss, Senator Jim Gaughran, for your unwavering support and for encouraging me to always pursue more. I dedicate this Note to my family, friends, and colleagues—all of whom provided unconditional support during three demanding years of law school and full-time employment. And lastly, to my love, my biggest cheerleader, and the best partner, Oscar—your endless support, home-cooked meals, and constant encouragement inspire me to keep chasing my dreams.

[1] Charles J. Hynes, *The Regulation of Nursing Homes: A Case Study*, 33 ACAD. POL. SCI. 126 (1980).

facilities by mandating a minimum percentage of revenue that must be spent on direct patient care. This policy has thus far been enacted by just three states. The crisis in America's nursing homes is the result of systemic failures in the regulation and oversight of the industry. This Note argues that a truly effective response requires swift and comprehensive federal action. This Note calls on Congress to enact a national direct care ratio with a revenue-focused approach, narrowly defining the costs allowed to count toward the minimum spending requirement and closely scrutinizing submitted costs. The pandemic made clear that the issues in America's nursing homes are a national problem that require a national solution.

INTRODUCTION

In the early days of the COVID-19 pandemic, a 120-bed nursing home in Massachusetts experienced 67 positive COVID-19 cases and 14 deaths, with 70 employees out sick.[2] Yet, when government public health officials sought to contact trace,[3] the facility "stonewalled" the officials.[4] The nursing home was so short staffed that nurses worked sixteen-to-twenty-four hour days, with a teenage nursing-assistant trainee charged with caring for "nearly 30 dementia patients."[5]

---

[2] Adrianna MacNeill, *'She is a Hero in Our Community': Nurse Who Died of COVID-19 is Recognized for Speaking Out About Littleton Facility*, BOSTON.COM (Apr. 14, 2020), https://www.boston.com/news/local-news/2020/04/14/nurse-recognized-life-care-center-nashoba-valley/ [https://perma.cc/L87J-32TV].

[3] Contact tracing is the process of notifying people who came into close contact with someone who tested positive for COVID-19 in order to help determine the extent of their contact with the COVID-19 positive individual and determine whether those who came into contact need to be tested for COVIID-19 or quarantine. *Contact Tracing*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html (last visited Feb. 12, 2022) [https://perma.cc/8JHG-5MD5].

[4] MacNeill, *supra* note 2.

[5] Chris Kirkham, *Life Care Fired Staffer Who Revealed Nursing Home Nightmare to Reuters*, REUTERS (June 22, 2020), https://www.reuters.com/article/us-health-coronavirus-nurses-retaliation/life-care-fired-staffer-who-revealed-nursing-home-nightmare-to-reuters-idUSKBN23T1JA [https://perma.cc/U6WC-DJF7]; *see* Chris Kirkham & Benjamin Lesser, *Special Report: Pandemic*

Across the border at a 588-bed nursing home in New York, 116 residents died over a three-month period—nearly 20% of that facility's population.[6] The facility failed to communicate confirmed COVID-19 cases to residents' families, leaving families to discreetly obtain information from other sources, including staff members, about the state of affairs inside the facility.[7] In addition to flouting laws ordering facilities to communicate with family members, this New York facility improperly underreported COVID-related deaths to the state entity charged with oversight of the facility—the New York State Department of Health ("NYSDOH")—a discrepancy that was only corrected after a local newspaper compared death certificates filed with the local township to those filed with the NYSDOH.[8]

In New Jersey, a nursing home was so short-staffed, "nursing assistants found residents who had been dead for several hours in rooms no one had time to check."[9] Like the facilities in Massachusetts and New York, the New Jersey nursing home "kept [residents and staff] in the dark for weeks about the extent of the facility's outbreak."[10]

All three of these nursing homes share a common characteristic: all are for-profit facilities organized as either a limited liability company or a corporation, forms commonly used to limit a facility owner's legal and financial liabilities and make it more difficult to trace ownership of a facility and the facility's actual spending on direct patient care.[11] Organizing as a limited liability company or

---

Exposes Systemic Staffing Problems at U.S. Nursing Homes, REUTERS (June 10, 2020), https://www.reuters.com/article/us-health-coronavirus-nursinghomes-speci/special-report-pandemic-exposes-systemic-staffing-problems-at-u-s-nursing-homes-idUSKBN23H1L9 [https://perma.cc/7SMT-F8G9].

[6] *See* Jim Baumbach et al., *Crisis, Care and Tragedy on LI*, NEWSDAY (Aug. 15, 2020), https://projects.newsday.com/long-island/coronavirus-cold-spring-hills-nursing-home/ [https://perma.cc/W7K2-FHFP].

[7] *See id.*

[8] *See id.*

[9] Kirkham & Lesser, *supra* note 5.

[10] *Id.*

[11] *Cold Spring Hills Center for Nursing and Rehab*, MEDICARE, https://www.medicare.gov/care-compare/details/nursing-home/335555?id=7fd81e27-0a94-438a-b3ca-28d161981497&city=Woodbury&state=NY&zipcode= (last visited Nov. 27, 2021) [https://perma.cc/6C3P-

corporation obscures the true owners of a nursing home, conceals the real profits of a facility, limits tort liability, and allows owners to evade liability from government regulations, law enforcement, and aggrieved parties.[12] In contrast, non-profit nursing homes lack a profit incentive, empirically devote more resources to direct patient care, and provide higher-quality care for residents.[13]

The serious, pervasive problems highlighted in these three for-profit facilities are not unique to these facilities, nor are these problems solely attributable to the COVID-19 pandemic. Rather, the pandemic exacerbated, and ultimately revealed, fundamental issues within nursing homes, ranging from chronic staffing shortages to insufficient personal protective equipment ("PPE") and other

---

BKKL]; *Hammonton Center for Rehabilitation and Healthcare*, MEDICARE.GOV, https://www.medicare.gov/care-compare/details/nursing-home/315209?city =Hammonton&state=NJ&zipcode= (last visited Nov. 27, 2021) [https://perma.cc /PP5M-YWPK]; *see Life Care Center of Nashoba Valley*, MEDICARE.GOV, https://www.medicare.gov/care-compare/details/nursing-home/225569?id =1031f3fb-3a81-4ce9-88fc-34780b992ebb&city=Littleton&state=MA &zipcode= (last visited Nov. 27, 2021) [https://perma.cc/S23D-GL9K]; *see generally Choose a Business Structure*, SBA, https://www.sba.gov/business-guide/launch-your-business/choose-business-structure (last visited Nov. 27, 2021) [https://perma.cc/2AVJ-XHPH]; *see* Charlie Specht, *I-Team: Following the Money in Nursing Home Ownership*, WKBW (Mar. 18, 2021), https://www.wkbw.com/news/i-team/i-team-following-the-money-in-nursing-home-ownership [https://perma.cc/8GGQ-VQFB]; *see also* Ted Sherman, *Who is Responsible When a Nursing Home is Providing Poor Care? Sometimes It's Hard to Find Out.*, NJ.COM (Feb. 15, 2022), https://www.nj.com/politics/2022/02/who-is-responsible-when-a-nursing-home-is-providing-poor-care-sometimes-its-hard-to-find-out.html [https://perma.cc/XK2L-39QB].

[12] *See* Melea Atkins, *The Impact of Private Equity on Nursing Home Care: Recommendations for Policymakers*, ROOSEVELT INST. (2021), https:// rooseveltinstitute.org/wp-content/uploads/2021/04/RI_NursingHomesandPE _IssueBrief_202104.pdf (noting that private equity firms often establish complex legal structuring of nursing home ownership to shield their profits and limit their liability).

[13] *See Non-Profit vs. For-Profit Nursing Homes: Is there a Difference in Care?*, CTRS. FOR MEDICARE ADVOC. (Mar. 15, 2012), https://medicareadvocacy .org/non-profit-vs-for-profit-nursing-homes-is-there-a-difference-in-care/ [https://perma.cc/4C28-Z53D].

medical supplies to inadequate protocols for controlling infectious disease spread.[14]

The United States treats "old age as a medical problem"—as a societal expense—rather than an investment.[15] This categorization, when compounded by the nation's profit-driven long-term care and health care systems, results in a nursing home system that prioritizes profits over patient care. The result is a nation filled with nursing homes that have long faced criticism of subpar care.[16] However, the spotlight shone upon the nursing home industry during the pandemic, particularly upon for-profit corporate facilities, has spurred legislative responses across the country.[17]

The most aggressive policy response taken by government bodies has been to cap the amount of profits that nursing home owners can extract from facilities, known as a direct care ratio

---

[14] These fundamental issues result from a failure, dating back decades, to adequately regulate nursing homes. Failure to control infectious disease spread, for instance, is a result of insufficient government rules requiring minimum standards to prevent contagious diseases, like COVID-19, from rapidly spreading in close quarters, and a result of insufficient staff levels to help contain the spread of contagious diseases. *See, e.g.*, Laura Romero & Dr. Jay Bhatt, *Pandemic Has Made Shortage of Health Care Workers Even Worse, Say Experts*, ABC NEWS (May 21, 2021), https://abcnews.go.com/US/pandemic-made-shortage-health-care-workers-worse-experts/story?id=77811713 [https://perma.cc/NZB7-CTXA]; Joe Eaton, *Who's to Blame for the 100,000 COVID Dead in Long-Term Care?*, AARP (Dec. 3, 2020), https://www.aarp.org/caregiving/health/info-2020/covid-19-nursing-homes-who-is-to-blame.html [https://perma.cc/8TR8-A3Y4].

[15] *See* Gabriel Winant, *Trumpcare Could Bring Back an Epidemic of Abuse*, N.Y. TIMES (June 28, 2017), https://www.nytimes.com/2017/06/28/opinion/trumpcare-senior-abuse-nursing-obamacare.html [https://perma.cc/7W74-MC2Z].

[16] *See, e.g.*, Kay Lazar, *A Pattern of Profit and Subpar Care at Mass. Nursing Homes*, BOS. GLOBE (May 3, 2016, 4:30 AM), https://www.bostonglobe.com/metro/2016/03/26/profit-and-care-massachusetts-nursing-homes/JfpOM6rwcFAObDi2JLcAnN/story.html [https://perma.cc/R8YP-65VL]; David Robinson, *New York Nursing Homes on List of 400 Facilities with 'Persistent Record of Poor Care,'* LOHUD (June 4, 2019, 4:23 PM), https://www.lohud.com/story/news/health/2019/06/04/ny-nursing-homes-persistent-record-poor-care-revealed/1337642001/ [https://perma.cc/LR9X-CK7A].

[17] *See* Susan Jaffe, *After Pandemic Ravaged Nursing Homes, New State Laws Protect Residents*, KAISER HEALTH NEWS (Aug. 20, 2021), https://khn.org/news/article/after-pandemic-ravaged-nursing-homes-new-state-laws-protect-residents/ [https://perma.cc/QA9W-53TV].

("DCR").[18] DCRs establish a minimum percentage of revenue that nursing homes must spend on direct patient care, such as nurse staffing levels and rehabilitative services.[19] DCRs effectively cap a facility's profits.[20] In 2020 and 2021, Massachusetts, New York, and New Jersey adopted a DCR.[21] This revenue-focused approach seeks to improve the quality of care that society's most vulnerable residents receive when entrusted to the care of America's 15,600 nursing homes.[22] Though DCRs are a laudable policy goal, the state-level DCRs enacted in response to the pandemic vary widely from one another.[23] These variations are a product of our federalist system and a result of nominal efforts by Congress to regulate the nursing home industry.[24] These variations also highlight the acute vulnerabilities state-level DCRs face, such as sophisticated nursing

[18] *See* Susan Jaffe, *3 States Limit Nursing Home Profits in Bid to Improve Care*, KAISER HEALTH NEWS (Oct. 25, 2021), https://khn.org/news/article/3-states-limit-nursing-home-profits-in-bid-to-improve-care/ [https://perma.cc/33EG-FU5T]; Jenna Carlesso, *Should Nursing Homes be Told How to Spend Public Funds? Some Say Yes*, THE CT. MIRROR (Nov. 16, 2021), https://ctmirror.org/2021/11/16/should-nursing-homes-be-told-how-to-spend-public-funds-some-say-yes/ [https://perma.cc/CZ5S-8EYC]; Special Report, CTR. FOR MEDICARE ADVOC. (July 2021), https://medicareadvocacy.org/wp-content/uploads/2021/08/Report-Staffing-Shortages-in-Nursing-Homes-07.2021.pdf [https://perma.cc/X3Y2-X72M].

[19] DCRs are synonymous with medical loss ratios ("MLRs"). *See Medical Loss Ratios for Nursing Homes: Protecting Residents and Public Funds*, CTR. FOR MEDICARE ADVOC. (Aug. 13, 2018), https://medicareadvocacy.org/medical-loss-ratios-for-nursing-homes-protecting-residents-and-public-funds/ [https://perma.cc/8F9S-PKZR].

[20] *See, e.g.*, *New York Budget Requires Nursing Homes Spend 70% Of Revenue On Direct Resident Care*, GARFUNKEL WILD (Apr. 7, 2021), https://garfunkelwild.com/new-york-budget-requires-nursing-homes-spend-70-of-revenue-on-direct-resident-care/ [https://perma.cc/L8WV-LVKU].

[21] *See* Jaffe, *supra* note 18; N.Y. PUB. HEALTH LAW § 2828 (2021); N.J. STAT. ANN. § 30:4D-7cc (2020); 101 MASS. CODE REGS. 206.12 (2021).

[22] *See Nursing Home Care*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/fastats/nursing-home-care.htm (last visited Nov. 27, 2021) [https://perma.cc/92KT-P8PS]; Carlesso, *supra* note 18.

[23] *Compare* N.Y. PUB. HEALTH LAW § 2828 (2021), *with* N.J. STAT. § 30:4D-7cc (2020), *and* 101 MASS. CODE REGS. 206.12 (2021).

[24] *See Nursing Home Reform Bill Hits Congress*, HOMECARE (Mar. 16, 2021), https://www.homecaremag.com/news/nursing-home-reform-bill-hits-congress [https://perma.cc/CAM3-V4MK].

home owners evading the DCR by exploiting loopholes in state laws.[25] Such evasion is already an issue in states struggling to effectively regulate nursing home facilities that have demonstrated their ability to exploit legal loopholes.[26]

New York's DCR broadly defines allowable activities that a facility may count towards the DCR and grants the NYSDOH Commissioner *sole* discretion to "waive the requirements" of the law.[27] Consequently, New York's DCR remains vulnerable to exploitation—by nursing homes counting activities towards the DCR that lack a clear relation to patient care, or by nursing homes lobbying the Commissioner to exempt their compliance.[28] New Jersey's and Massachusetts' DCRs are similarly flawed.[29] These three laws illustrate the uphill challenges states encounter when seeking to enact state-level DCRs.

The federal government's delegation to the states to control nursing homes oversight and enforcement is failing.[30] This is

---

[25] *See* Eleanor Laise, *Why Many Nursing-Home Owners Have Escaped Scrutiny of Their Roles in the COVID-19 Crisis*, MARKETWATCH (Apr. 30, 2021, 11:16 AM), https://www.marketwatch.com/story/nursing-home-reform-efforts-hit-roadblocks-11619736861 [https://perma.cc/EWM8-72XU] (discussing how the "patchwork" of state regulation allows private equity owners to evade scrutiny).

[26] *See* Allegra Abramo & Jennifer Lehman, *How N.Y.'s Biggest For-Profit Nursing Home Group Flourishes Despite a Record of Patient Harm*, PROPUBLICA (Oct. 27, 2015, 8:00 AM), https://www.propublica.org/article/new-york-for-profit-nursing-home-group-flourishes-despite-patient-harm [https://perma.cc/RP5U-8N2N]. Applicants seeking to purchase a nursing home in New York need approval from the New York State Department of Health's Public Health and Health Planning Council, which reviews, among other components, an applicant's "character-and-competence" including ownership stakes in other nursing homes in the state and violations at those facilities. Some applicants with violations at other owned facilities "shuffle ownership shares" by transferring ownership to a child or spouse's name to avoid scrutiny by the Council. *See infra* Part III, Subsection C for a discussion of how nursing homes subvert New York state law governing related-party transactions.

[27] *See* N.Y. PUB. HEALTH LAW § 2828 (2021) (emphasis added).

[28] *See* Jaffe, *supra* note 18.

[29] *See infra* Part III of this Note discussing the DCR laws.

[30] *See Broken Promises: An Assessment of Federal Data on Nursing Home Oversight*, THE LONG TERM CARE CMTY. COAL. (2021),

illustrated through the varying state laws that set minimum staffing levels at nursing homes. Experts consistently note that staffing levels directly correlate to the level of patient care afforded to nursing home residents,[31] yet there is no national standard. A truly effective revamping of America's nursing home industry requires swift and comprehensive federal action.

This Note argues that Congress should enact a national DCR with a revenue-focused approach. A national DCR will set a baseline of standards for care within nursing homes. Such a national DCR should narrowly define allowable costs eligible to count towards the DCR and provide close scrutiny of submitted costs. Congress has the authority to legislate a national DCR, having successfully demonstrated its legal authority to do so with a similar requirement for insurance companies passed in the Affordable Care Act.[32] The systemic flaws within oversight of the nation's nursing homes were exposed time and time again during the COVID-19 pandemic. Effectively regulating this country's nursing homes is a national problem that requires a national solution.

This Note proceeds in the following parts. Part I lays the foundation for why nursing home oversight is at the forefront of public attention, detailing the convergence between COVID-19 related nursing home issues and long-stemming issues in the nursing home industry. Part II establishes the historical and legal background of DCR laws. Part III provides an overview of the three states which have enacted DCRs by comparing the substance and process of each state's DCR policy. Finally, Part IV proposes a national DCR to set a baseline of standards that nursing homes across the country must follow in caring for society's most vulnerable residents.

---

https://nursinghome411.org/wp-content/uploads/2021/10/Broken-Promises.NH-Oversight-Data-Assessment.pdf.

[31] Charlene Harrington et al., *Appropriate Nurse Staffing Levels for U.S. Nursing Homes*, 13 HEALTH SERV. INSIGHTS 1, 1 (2020).

[32] *See* Meghan S. Stubblebine, *The Federal Medical Loss Ratio: A Permissible Federal Regulation or an Encroachment on State Power?*, 55 WM. & MARY L. REV. 341, 357–61 (2013); Susanne Cordner, *Adjusting the Benefits and Burdens of Economic Life for the Public Good: The ACA's Medical Loss Ratio as a Constitutional Regulation of Health Insurance Companies*, 24 WM. & MARY BILL RTS. J. 213, 249 (2015).

I. WHY NURSING HOME OVERSIGHT IS AT THE FOREFRONT OF PUBLIC ATTENTION

The headline of one national news network blared, "America now knows that nursing homes are broken. Does anyone care enough to fix them?"[33]

Nursing homes have been a subject of media scrutiny, public outrage, and legislative attention for decades.[34] Since the 1970s, state and federal legislators have sought to pass reforms aimed at improving oversight and increasing the standards of care within the nation's nursing homes, with varied success.[35] The challenges to passing comprehensive reforms through Congress, combined with the nation's federalist system of governance, has largely left oversight of nursing homes to the states.[36] Nursing homes must abide by federal standards to remain eligible for federal funding,

---

[33] Suzy Khimn, *America Now Knows That Nursing Homes are Broken. Does Anyone Care Enough to Fix Them?*, NBC NEWS (Mar. 15, 2021), https://www.nbcnews.com/politics/politics-news/america-now-knows-nursing-homes-are-broken-does-anyone-care-n1259766 [https://perma.cc/RUY5-TENH].

[34] *See* Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES (Sept. 23, 2007), https://www.nytimes.com/2007/09/23/business/23nursing.html [https://perma.cc/4JUP-C4EW]; Omnibus Budget Reconciliation Act of 1987, H.R. 3545, 100th Cong. § 4201 (1987) (enacted); Gabriel Winant, *A Place to Die: Nursing Home Abuse and the Political Economy of the 1970s*, 105 J. AM. HIST. 96–120 (2018).

[35] *See, e.g.*, Winant, *supra* note 15; MaryBeth Musumeci & Priya Chidambaram, *Key Questions About Nursing Home Regulation and Oversight in the Wake of COVID-19*, KFF (Aug. 3, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-nursing-home-regulation-and-oversight-in-the-wake-of-covid-19/ [https://perma.cc/Y2SJ-CZH6]; David C. Grabowski, *Strengthening Nursing Home Policy for the Postpandemic World: How Can We Improve Residents' Health Outcomes and Experiences?*, THE COMMONWEALTH FUND (Aug. 20, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/strengthening-nursing-home-policy-postpandemic-world [https://perma.cc/ZJY5-5ELP].

[36] *See* Musumeci & Chidambaram, *supra* note 35; *see also* Ezra Klein, *Congressional Dysfunction*, VOX (May 15, 2015), https://www.vox.com/2015/1/2/18089154/congressional-dysfunction [https://perma.cc/X89B-YYSL] (explaining the challenges of passing comprehensive reforms through Congress).

with states responsible for the licensure and oversight of facilities.[37] Thus, nursing home regulation varies widely from state-to-state, with federal certification[38] operating alongside state licensure.[39] For example, federal law requires all nursing homes to "be licensed under applicable State and local law,"[40] which under New York law requires nursing homes to operate "under the supervision of an administrator who holds a currently valid nursing home administrator's license and registration."[41] Yet, nursing homes are more than an avenue to regulate from a consumer protection perspective: nursing homes provide acute medical care, some are "set up like a hospital,"[42] and in New York, are regulated like hospitals.[43]

The fifty states distinctively regulate nursing homes within their jurisdiction, a failing feature of American governance that has tragic implications for nursing home residents. In America's nursing homes, residents are reportedly "kept in soiled diapers so long their

---

[37] *See* Tancy Joe Vandecar-Burdin, *A State Comparative Study of the Factors Influencing Nursing Home Quality of Care Regulation*, 14 (Spring 2009) (unpublished Ph.D. dissertation, Old Dominion University) (on file with the Old Dominion University).

[38] Nursing homes must be licensed by the state they operate in. Federal certification is optional but is required for facilities that seek Medicare or Medicaid reimbursements. *See Federal Certification for a Health Facility*, NMHEALTH, https://www.nmhealth.org/about/dhi/hflc/prop/fcrt/ (last visited Feb. 13, 2022) [https://perma.cc/63F2-W7SV].

[39] *See* Laise, *supra* note 25 (discussing how the "patchwork" of state regulation allows private equity owners of nursing homes to evade regulatory scrutiny).

[40] 42 C.F.R. § 483.70 (2019).

[41] *Nursing Home Administrator*, N.Y. DEP'T OF HEALTH, https://health.ny.gov/professionals/nursing_home_administrator/ (last visited Feb. 27, 2022) [https://perma.cc/M7UC-6SAK]; N.Y. COMP. CODES R. & REGS. tit. 10, § 415.26 (2020).

[42] Some nursing homes are equipped to provide care akin to that offered in a hospital setting including breathing treatments, wound care, skilled nursing care, and post-surgery support. *See, e.g.*, *Nursing Homes*, HEALTH IN AGING, https://www.healthinaging.org/age-friendly-healthcare-you/care-settings/nursing-homes (last visited Feb. 12, 2022) [https://perma.cc/VR5E-N84H]; *Nursing Homes*, MEDLINE PLUS, https://medlineplus.gov/nursinghomes.html (last visited Nov. 27, 2021) [https://perma.cc/97SM-2PU8].

[43] *See* N.Y. PUB. HEALTH LAW § 2801 (2019).

skin peeled off, left with bedsores that cut to the bone, and allowed to wither away in starvation or thirst."[44] Even residents healthy prior to the pandemic who avoided contracting COVID-19 suffered terribly; one elderly man dropped to ninety-eight pounds, dying in late 2020 from septic shock, as a result of his facility's failure to provide him care.[45]

The COVID-19 pandemic exposed the egregious state of America's nursing homes.[46] Cracks that existed in the nation's nursing home system burst wide open during the pandemic. Nursing homes became "ground zero" for COVID-19, publicly excoriated as "death pits" and "superspreaders."[47] Problems ranging from insufficient staffing levels to protocols that fail to control infectious disease spread existed pre-pandemic, but were worsened by the strains of combatting COVID-19.[48] Prior to the pandemic, nursing homes were besieged by chronic staffing shortages and inadequately staffed facilities.[49] These issues became acutely felt inside nursing homes as the pandemic raged and patients suffered.[50]

Nursing homes were particularly vulnerable to mass COVID-19 outbreaks since they predominately house elderly and medically

---

[44] Matt Sedensky & Bernard Condon, *Not Just COVID: Nursing Home Neglect Deaths Surge in Shadows*, AP NEWS (Nov. 19, 2020), https://apnews.com/article/nursing-homes-neglect-death-surge-3b74a2202140c5a6b5cf05cdf0ea4f32 [https://perma.cc/7KNF-UCZW].

[45] *See id.*

[46] *See* Karen Wolk Feinstein, *What COVID-19 Exposed In Long-Term Care*, HEALTH AFFS. (Nov. 5, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201104.718974/full/ [https://perma.cc/QW99-GA3D].

[47] Edward Alan Miller et al., *Thrust Into Spotlight: COVID-19 Focuses Media Attention on Nursing Homes*, 76 J. OF GERONTOLOGY 213–18 (2021); Farah Stochman et al., *'They're Death Pits': Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html [https://perma.cc/3VTD-55Z4].

[48] *See* Deborah Gastfreund Schuss, *COVID-19's Deadly Lesson: Time to Revamp Long-Term Care,* HEALTH AFFS. (Nov. 17, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201110.707118/full/ [https://perma.cc/B3FA-2HNB].

[49] *See* Christina Maxouris, *Covid-19 Exposed the Devastating Consequences of Staff Shortages in Nursing Homes. But the Problem Isn't New*, CNN (July 6, 2021, 10:56 PM), https://www.cnn.com/2021/06/27/us/nursing-homes-staff-shortages/index.html [https://perma.cc/R2K5-UNPW].

[50] *See id.*

vulnerable persons.[51] The first major outbreak at a United States nursing home was in February 2020—before COVID-19 dominated the nation's daily attention—and the contagious virus moved aggressively and swiftly throughout that facility.[52] As devastating news accounts painted grim depictions of life inside the facility, media reporting also revealed something more alarming: a nursing home industry unprepared for the pandemic to come.[53]

Constant media attention highlighted the problematic conditions within nursing homes.[54] A steady stream of negative local, national, and international media stories depicted a failing nursing home system and inadequate government oversight.[55] Media investigations prompted governmental investigations into nursing homes.[56] Television reports filmed desperate, dying patients, whose kin organized and protested for government action.[57]

---

[51] Sally Hall Dykgraaf et al., *Protecting Nursing Homes and Long-Term Care Facilities From COVID-19: A Rapid Review of International Evidence*, 22 J. AM. MED. DIR. ASS'N 1969–88 (2021).

[52] Asia Fields & Mary Hudetz, *Coronavirus Spread at Life Care Center of Kirkland for Weeks, While Response Stalled*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/times-watchdog/coronavirus-spread-in-a-kirkland-nursing-home-for-weeks-while-response-stalled/ (last updated Jan. 11, 2021, 12:27 PM) [https://perma.cc/M27G-FTGC].

[53] *See* Jack Healy & Serge F. Kovaleski, *The Coronavirus's Rampage Through a Suburban Nursing Home*, N.Y. TIMES, https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html (last updated May 21, 2020) [https://perma.cc/YJ7Q-9CMT].

[54] *See* Gastfreund Schuss, *supra* note 48; Lazar, *supra* note 16 (discussing issues such as insufficient personal protective equipment and inadequate nurse staffing that were revealed because of media stories into the conditions at nursing homes).

[55] *See* Miller et al., *supra* note 47.

[56] *See, e.g.*, Sandra Peddie & Jim Baumbach, *State AG's Office Issues Subpoenas to Operators of Cold Spring Hills Nursing Home*, NEWSDAY (Sept. 18, 2020), https://www.newsday.com/news/health/coronavirus/nursing-home-subpoena-covid-1.49230670 [https://perma.cc/5Q4X-HLN3].

[57] *See* Megan Cerullo & Kate Gibson, *COVID-19 Again Tearing Through Nursing Homes, as Death Toll Rises*, CBS NEWS (Dec. 11, 2020, 3:20 PM), https://www.cbsnews.com/news/nursing-homes-covid-vulnerability/ [https://perma.cc/MZM2-4W9J]; Michelle R. Davis & Deborah Schoch, *As COVID-19 Ravages Nursing Homes, Advocates Push for Reforms*, AARP (Apr. 23, 2020),

With media attention on nursing homes, public outrage grew dramatically, pressuring lawmakers to respond.[58] Legislators from both major political parties jumped into action, introducing proposals in state legislatures across the country.[59] These proposals ranged from direct responses to governmental failures during the pandemic—such as revoking liability shields for nursing home operators instituted in the early weeks of the pandemic[60]—to responses addressing more fundamental failures, like bills to mandate safe staffing levels, a long-sought-after goal of the nurses' lobby.[61] The passage of state-level DCRs, arguably the strongest governmental actions taken to address chronic failures in nursing home regulation, were neither novel nor untested. Rather, DCRs for nursing homes have been decades in the making.

II. Overview of "Direct Care Ratio" Laws

A. Historical Background

The history of modern-day nursing homes, and the subsequent profitization of elder care, can be traced to the passage of the Social

---

https://www.aarp.org/caregiving/health/info-2020/coronavirus-nursing-home-reform.html [https://perma.cc/93RD-NWL9].

[58] *See* Miller et al., *supra* note 47, at 4–5; Gastfreund Schuss*, supra* note 48.

[59] Davis & Schoch, *supra* note 57; Eram Abbasi, *2021 Aging Related State Legislation*, LEADING AGE (Mar. 7, 2022), https://leadingage.org/legislation/2021-aging-related-state-legislation [https://perma.cc/8TVW-JNA5].

[60] David Robinson, *NY lawmakers Pass Bill to Repeal COVID-19 Liability Protections for Nursing Homes, Hospitals*, LOHUD (Mar. 24, 2021), https://www.lohud.com/story/news/coronavirus/2021/03/24/covid-liability-protections-health-providers-new-york/6980081002/ [https://perma.cc/7Q3R-ZD6X].

[61] Press Release, New York State Senate, Senate to Pass Legislation Repealing Immunity Protections and Further Improving Transparency at Nursing Homes (Mar. 24, 2021), https://www.nysenate.gov/newsroom/press-releases/senate-pass-legislation-repealing-immunity-protections-and-further-0 [https://perma.cc/5ACN-8KZ8]; Katherine Gregg, *House Approves Nursing Home Staffing Mandate With Dose of Relief Thrown in*, PROVIDENCE J. (May 4, 2021), https://www.providencejournal.com/story/news/politics/2021/05/04/house-approves-nursing-home-staffing-mandate-dose-relief-thrown/4931062001/ [https://perma.cc/KW8C-GAVV].

Security Act in 1935.[62] In an effort to provide financial support to the aging and indigent, Congress enacted a massive new social safety net—Social Security.[63] Following the Great Depression, the federal government sought to eliminate almshouses[64] as housing for the elderly, an undesirable living arrangement that had become synonymous with "poorhouses" that were used to protect the public from the "poor and feeble."[65] To keep the aging out of almshouses, Congress established the Old Age Assistance program, which provided eligible persons with direct support payments.[66] A few years later, Congress passed the Hill-Burton Act, giving "grants for nursing homes built in conjunction with hospitals."[67] Two decades later, in 1965, Congress created Medicare and Medicaid, programs which became lucrative sources of funding for nursing homes.[68] Through these social safety net programs, the federal government

---

[62] Grace Birnstengel, *How'd We Get Here? The History of Nursing Homes*, NEXT AVENUE (Mar. 5, 2021), https://www.nextavenue.org/history-of-nursing-homes/ [https://perma.cc/X66E-J8WE]; INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES app. A (1986).

[63] Birnstengel, *supra* note 62; INST. OF MED., *supra* note 62, at app. A.

[64] Almshouses were local publicly run housing institutions for infirm or impoverished elderly without alternate means for residence. Such institutions were common throughout the United States until the 1950s, following passage of the Social Security Act. *Almshouse*, BRITANNICA, https://www.britannica.com/topic/almshouse (last visited Nov. 28, 2021) [https://perma.cc/7PXN-ZTX4].

[65] Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid's History*, 26 GA. ST. U. L. REV. 937, 940 (2010).

[66] INST. OF MED., *supra* note 62, at app. A.

[67] The Hill-Burton Act gave nursing homes and hospitals grant funding to build and modernize facilities, with the condition that a portion of services be ensured for individuals unable to pay for care and the services be made available to individuals in the facility's neighborhood. *See Hill-Burton Free and Reduced-Cost Health Care*, HRSA, https://www.hrsa.gov/get-health-care/affordable/hill-burton/index.html (last visited Feb. 12, 2022) [https://perma.cc/AS4V-YPDH]; Birnstengel, *supra* note 62.

[68] INST. OF MED., *supra* note 62, at app. A; Katie Thomas, *In Race for Medicare Dollars, Nursing Home Care May Lag*, N.Y. TIMES (Apr. 14, 2015), https://www.nytimes.com/2015/04/15/business/as-nursing-homes-chase-lucrative-patients-quality-of-care-is-said-to-lag.html [https://perma.cc/9SUT-TRVL].

effectively started subsidizing nursing homes.[69] Incentivization of the business of nursing homes had officially begun.[70]

By the 1970s, the American public was shocked by recurrent abuse and scandals in nursing homes across a dozen states, epitomized by the bombshell exposé into conditions at John J. Kane Hospital in Pittsburgh.[71] States commenced investigations.[72] Congress convened hearings.[73] President Richard Nixon made lofty promises to improve the system.[74] These efforts culminated in passage of federal nursing home reforms in 1972.[75] The reforms largely relied on regulatory implementation by the Department of Health and Human Services ("HHS"), and while members of Congress urged against "dilute[ed] or weaken[ed] . . . standards for skilled nursing facilities," the final regulations ultimately weakened federal nursing home oversight—loosening staffing requirements, waiving the rules in certain instances, and other reductions.[76] Despite Congressional cautions against weakened standards, the

---

[69] Steve Sternberg, *In 1965, Experts Warned of Medicare-Induced Crisis*, U.S. NEWS (July 30, 2015), https://www.usnews.com/news/articles/2015/07/30/in-1965-experts-warned-of-medicare-induced-crisis [https://perma.cc/CMU4-6P8R].

[70] *See* Will Englund & Joel Jacobs, *How Government Incentives Shaped the Nursing Home Business – and Left it Vulnerable to a Pandemic*, WASH. POST (Nov. 27, 2020), https://www.washingtonpost.com/business/2020/11/27/nursing-home-incentives/ [https://perma.cc/PGH2-D8F4]; Leslie King, *How Government Created and Shaped the U.S. Nursing Home Industry*, 46 CRITICAL SOC. 881, 885 (2020).

[71] An employee-led exposé into the John J. Kane Hospital revealed video evidence of residents kept in squalor, with some confined to beds that lacked bed rails while lying soaked in their urine and others confined to geri-chairs without access to exercise or clean clothing. Residents were regularly given unnecessary sedation or left for days without the dressing on their wounds being changed, while others were purposely starved, tortured, or unnecessarily committed to psychiatric care. The covert video evidence ultimately wound up before Congress, eventually leading to Congressional hearings and other investigations. The "scandal was one of the most dramatic of the 1970s wave of nursing home scandals." Winant, *supra* note 34, at 96–120.

[72] ROBERT A. GIACALONE, THE US NURSING HOME INDUSTRY 27 (2000).

[73] INST. OF MED., *supra* note 62, at app. A.

[74] *See id.*

[75] *See id.*

[76] *See id.*

reforms were adopted by HHS, and ultimately had "a negligible effect on improving care."[77]

Efforts to reform nursing homes in the decades since have faced similar challenges, exacerbated by the nursing home lobby's expertise and skill in undermining reforms.[78] Recent attempts to change laws governing nursing homes ran up against the "powerhouse" nursing home lobby, which spends upwards of "tens of millions of dollars" annually to ward off increased government oversight.[79] The nursing home lobby fends off reforms by "arguing that they cannot provide care for the limited payment they receive from Medicaid."[80] More than 74% of the money flowing through nursing homes to fund patient care originates from taxpayer-funded public health care programs: Medicare and Medicaid.[81]

This tension—weighing proper oversight against concerns about the day-to-day impact regulations have on nursing homes' viability—continues to this day.[82] While government officials tasked with enforcing regulations argue that there are inadequate resources to support proper oversight of nursing homes, the forceful nursing home lobby argues the opposite—sufficient oversight by regulators exists, complemented by self-regulation from the industry.[83]

---

[77] *See* SUBCOMMITTEE ON LONG-TERM CARE, NURSING HOME CARE IN THE UNITED STATES, FAILURE IN PUB. POL'Y, 208 (1974).

[78] *See* Michael Balboni, *Commentary: Proposals Threaten Nursing Homes*, TIMES UNION (Mar. 21, 2021), https://www.timesunion.com/opinion/article/Commentary-Proposals-threaten-nursing-homes-16042580.php [https://perma.cc/U8FL-E9A6].

[79] Maggie Severns & Rachel Roubein, *As Residents Perish, Nursing Homes Fight for Protection from Lawsuits*, POLITICO (May 26, 2020), https://www.politico.com/news/2020/05/26/nurising-homes-coronavirus-lawsuits-281654 [https://perma.cc/ABD6-UW66].

[80] *See* Howard Gleckman, *Hill Democrats Offer Nursing Homes More Money, But Demand Reforms In Return*, FORBES (Aug. 11, 2021), https://www.forbes.com/sites/howardgleckman/2021/08/11/hill-democrats-offer-nursing-homes-more-money-but-demand-reforms-in-return/?sh=4e53a031204c [https://perma.cc/SJ3M-RZ8R].

[81] *See* Musumeci & Chidambaram, *supra* note 35.

[82] *See generally* Balboni, *supra* note 78.

[83] *See* N.Y. ATT'Y GEN., Nursing Home Response to COVID-19 Pandemic (Jan. 30, 2021); *The Worst-Performing Nursing Facilities Are Seldom*

A key function of nursing home enforcement is considerable reliance on the states to enforce both state law and federal law.[84] The federal government testified before a Congressional Committee in 1971 that "reliance on state enforcement machinery had led to widespread nonenforcement of federal standards."[85] This model leaves the states as the main agent charged with enforcing federal laws governing nursing homes, from broad regulations requiring facilities to provide residents "the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care," to narrower regulations requiring nursing homes to periodically assess residents and develop individualized plans of care.[86]

Additionally, this model is dependent on sufficient state funding for enforcement. In New York, a blistering report in 2021 on COVID-19 and nursing homes issued by New York's Attorney General examined the disproportionate impact the pandemic had on the state's nursing homes, specifically noting that "many law enforcement agencies lack the resources to conduct such comprehensive investigations" to address the root causes of failures within New York facilities.[87] Inadequate oversight dates back decades.[88] Previous academic studies have also found "many of the state survey agencies responsible for implementing both state and

---

Sanctioned; Self-Reporting is Not an Accurate Quality Measurement, CTR. FOR MEDICARE ADVOC. (Jan. 24, 2013), https://medicareadvocacy.org/the-worst-performing-nursing-facilities-are-seldom-sanctioned-self-reporting-is-not-an-accurate-quality-measurement/ [https://perma.cc/B275-C8FD.

[84] INST. OF MED., *supra* note 62, at ch. 4.

[85] *Id.* at app. A.

[86] *See* Press Release, Off. of the New York State Comptroller, State Health Department Should Improve Enforcement of Nursing Home Violations (Feb. 22, 2016), https://www.osc.state.ny.us/press/releases/2016/02/state-health-department-should-improve-enforcement-nursing-home-violations [https://perma.cc/5JNH-MDBJ]; 42 C.F.R. §§ 483.24, 483.20, 483.21.

[87] N.Y. ATT'Y GEN., *supra* note 83, at 65.

[88] Susan Arbetter, *New York: A Rich State With Poor Nursing Homes*, SPECTRUM NEWS (Feb. 12, 2021), https://spectrumlocalnews.com/nys/capital-region/news/2021/02/12/new-york--a-rich-state-with-poor-nursing-homes [https://perma.cc/FY3D-YV2X].

federal nursing facility regulations are underfunded, despite having received some increase in funding in recent years."[89]

Aside from funding, or lack thereof, this system of enforcement—reliant on fifty diverse, individual states—has proven ripe for exploitation by sophisticated nursing home operators.[90] Amid the backdrop of an evolving regulatory landscape, in the decades following the "infusion of public funds from Medicaid and Medicare" that began in the 1960s, the nursing home industry became dominated by "large chain-owned corporations."[91] Eventually, private equity firms began amassing ownership stakes in nursing homes, prominently so in the early 2000s.[92]

Academic research in recent years has sought to quantify the impact private equity ownership has on nursing homes.[93] Research has concluded that for-profit nursing homes provide significantly inferior care than their non-profit counterparts.[94] One study found that residents of private-equity-owned nursing homes are more likely to have emergency department visits and hospitalizations.[95] Other studies have found "higher patient mortality rates, reduced

---

[89] Kieran Walshe & Charlene Harrington, *Regulation of Nursing Facilities in the United States: An Analysis of Resources and Performance of State Survey Agencies*, 42 GERONTOLOGIST 475, 484 (2002).

[90] *See* Laise, *supra* note 25 (discussing how the "patchwork" of state regulation allows private equity owners to evade scrutiny).

[91] Charlene Harrington, *Public Policy & The Nursing Home Industry*, INT'L J. HEALTH SERVS. (1984).

[92] *See* Anaeze C. Offodile II et al., *Private Equity Investments in Health Care: An Overview of Hospital and Health System Leveraged Buyouts*, *2003-17*, HEALTH AFFS. (May 2021), https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.01535 [https://perma.cc/CL33-NHSV].

[93] Atul Gupta et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes*, NBER (Feb. 2021), https://www.nber.org/system/files/working_papers/w28474/w28474.pdf; Robert Tyler Braun et al., *Association of Private Equity Investment in US Nursing Homes With the Quality and Cost of Care for Long-Stay Residents*, JAMA NETWORK (Nov. 19, 2021), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2786442.

[94] *See* Gupta et al., *supra* note 93, at 2–3, 7.

[95] David Muoio, *Private-Equity-Acquired Nursing Homes Have Worse Resident Outcomes, Higher Medicare Costs, Study Finds*, FIERCE HEALTHCARE (Nov. 24, 2021), https://www.fiercehealthcare.com/finance/private-equity-acquired-nursing-homes-have-worse-resident-outcomes-higher-medicare-costs [https://perma.cc/UJV6-BAUQ].

staffing, overreliance on psychiatric medications, and reduced quality of care" in private-equity-backed nursing homes.[96] This disparity between for-profit and non-profit facilities was exacerbated by the strains of providing care during COVID-19.[97]

The care in private-equity-backed nursing homes worsened during the pandemic.[98]

For-profit nursing homes provided inferior care, experienced higher infection rates and counted higher death rates.[99] This resulted from factors including inadequate staffing, low reserve stocks of PPE, and poor infection control.[100] These factors are a consequence of the profit-driven business model of for-profit facilities.[101] For-profit nursing homes are "associated with . . . (PPE) shortages," with some facilities failing to maintain even a "1-week supply of [PPE]."[102] Maintaining a reserve stock of PPE is a cost outlay that impacts a facility's balance sheet.[103] Lax infection controls also exacerbated the spread of COVID-19 in for-profit nursing homes, since effective methods including "infection preventionist[s], staffing a registered nurse on every shift and paying workers for alternative transportation to discourage the use of mass transit" are

---

[96] EILEEN O'GRADY, PULLING BACK THE VEIL ON TODAY'S PRIVATE EQUITY OWNERSHIP OF NURSING HOMES 2 (2021).

[97] *See* Aimee Picchi, *At Private Equity-Owned Nursing Homes, an "Enormous" Increase in Death Rates, Study Finds*, CBS NEWS (Feb. 24, 2021), https://www.cbsnews.com/news/nursing-home-private-equity-death-rate/ [https://perma.cc/D937-FD7P].

[98] *See id.*

[99] THE DEADLY COMBINATION OF PRIVATE EQUITY AND NURSING HOMES DURING A PANDEMIC, AMERICANS FOR FINANCIAL REFORM 1 (2020).

[100] *See id.* at 2–5; *see also* Brian E. McGarry et al., *Severe Staffing and Personal Protective Equipment Shortages Faced by Nursing Homes During the COVID-19 Pandemic*, 39 HEALTH AFFS. 7 (2020).

[101] *See* AMERICANS FOR FINANCIAL REFORM, *supra* note 99 at 5 (discussing how the profit incentive behind private equity ownership of nursing homes "generates profits but compromises cares"); *see also* Kristen Pue et al., *Does the Profit Motive Matter? COVID-19 Prevention and Management in Ontario Long-Term-Care Homes*, 47 CANADIAN PUB. POL'Y 421, 425, 432 (2021).

[102] ANDERS MALTHE BACH-MORTENSEN ET AL., A SYSTEMATIC REVIEW OF THE ASSOCIATIONS BETWEEN CARE HOME OWNERSHIP AND COVID-19 OUTBREAKS, INFECTIONS AND MORTALITY, 1 NATURE AGING 948, 948 (2021); Braun et al., *supra* note 93.

[103] Braun et al., *supra* note 93.

costly.[104] One academic study concluded that "for-profit status [is] linked to exacerbated COVID-19 outcomes."[105]

B. Introduction to "Direct Care Ratio" Laws

COVID-19's disproportionate impact on nursing homes which are mostly populated by elderly or medically vulnerable persons, combined with relentless media attention on the crisis inside facilities, revealed fundamental flaws in the nation's system of nursing home oversight.[106] This galvanized families of nursing homes residents into action, persuading state lawmakers to introduce bill proposals to "fix" the evidenced failures within nursing homes throughout 2020 and 2021.[107] Proposals made their way through the legislative process, including a policy to mandate a minimum amount of revenue nursing homes must spend on providing direct care to residents, called a direct care ratio.[108] This policy is modeled on a concept in the federal Affordable Care Act ("ACA"), the Medical Loss Ratio ("MLR").[109] The MLR has roots

---

[104] *See* Kimberly Marselas, *For-Profit Nursing Homes are 'Worst Performers' in New COVID-19 Analysis*, MCKNIGHTS (Feb. 19, 2021), https://www.mcknights.com/news/for-profit-nursing-homes-are-worst-performers-in-new-covid-19-analysis/ [https://perma.cc/Y7ZN-53D2].

[105] Bach-Mortensen et al., *supra* note 102, at 948.

[106] Robert Weech-Maldonado et al., *High-Minority Nursing Homes Disproportionately Affected by COVID-19 Deaths*, 9 FRONT PUB. HEALTH 1, 4 (2021).

[107] *US: Concerns of Neglect in Nursing Homes*, HUMAN RTS. WATCH (Mar. 25, 2021), https://www.hrw.org/news/2021/03/25/us-concerns-neglect-nursing-homes [https://perma.cc/FZK6-BQ6F]; Press Release, New York State Senate, Senate Majority to Advance Legislation to Improve Oversight and Care at Nursing Homes (Feb. 22, 2021) https://www.nysenate.gov/newsroom/press-releases/senate-majority-advance-legislation-improve-oversight-and-care-nursing-homes [https://perma.cc/HTP4-W9VQ]; *see* Rachel May, *'We Need to Be Tougher' on Cuomo over Covid in Nursing Homes (Commentary)*, SYRACUSE.COM (Feb. 18, 2021), https://www.syracuse.com/opinion/2021/02/sen-rachel-may-we-need-to-be-tougher-on-cuomo-over-covid-in-nursing-homes-commentary.html [https://perma.cc/89LR-K3K2].

[108] *See* Jaffe, *supra* note 18.

[109] *See* CTR. FOR MEDICARE ADVOC., *supra* note 19.

in state-level public health policy dating back to the 1990s, with states requiring insurers to account for expenses.[110]

The MLR seeks to limit the amount of money health insurance companies can siphon from premiums by requiring insurers to spend a minimum of 80% of premium revenue on health care and quality improvement activities.[111] This effectively caps the amount of money from health insurance premiums that insurance companies can spend on administrative costs.[112] Congress passed the MLR as part of the ACA with the explicit goal of "bringing down the cost of health care coverage."[113] The primary objective for inclusion of the MLR was to ensure insurance consumers get "value for their premium dollar."[114] The Congressional record of debate during the ACA plainly evidences this intent.[115] Congress members argued the MLR would reduce the amount of money insurance companies were diverting from providing health care with spending on administrative costs, marketing, profits, executive compensation, and other activities that lacked a direct benefit to consumers.[116] One

---

[110] *See* James C. Robinson, *Marketwatch: Use And Abuse Of The Medical Loss Ratio To Measure Health Plan Performance*, HEALTH AFFS. (July/Aug. 1997), https://www.healthaffairs.org/doi/10.1377/hlthaff.16.4.176 [https://perma.cc/7LKU-VRFV].

[111] Quality improvement activities improve health care quality. Qualified activities include programs to prevent hospital readmission, efforts to lower mortality rates, and educational programs designed to address obesity. *See* 45 C.F.R. § 158.150 (2021); Suzanne M. Kirchhoff, Cong. Research Serv., R42735, MEDICAL LOSS RATIO REQUIREMENTS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA): ISSUES FOR CONGRESS (2015); Timothy Jost, *Implementing Health Reform: Medical Loss Ratios*, HEALTH AFFS. (Nov. 23, 2010), https://www.healthaffairs.org/do/10.1377/hblog20101123.008047/full/ [https://perma.cc/D7Y3-UMKL]; 45 C.F.R. § 158.210 (2021).

[112] *See Explaining Health Care Reform: Medical Loss Ratio (MLR)*, KFF (Feb. 29, 2012), https://www.kff.org/health-reform/fact-sheet/explaining-health-care-reform-medical-loss-ratio-mlr/ [https://perma.cc/9SYM-CBTY].

[113] *See* 42 U.S.C. § 300gg–18.

[114] *See* 157 CONG. REC. H266 (daily ed. Jan. 19, 2011) (statement of Rep. Rush D. Holt) (claiming that the ACA will secure adequate health care service to almost all Americans because it requires health insurance companies to "spend . . . premium dollars on actually providing health care").

[115] *See id.*

[116] *See* H.R. REP. No. 111-443, vol. I, at 214 (2010), reprinted in 2010 U.S.C.C.A.N. 127, 138; S. REP. No. 111-89, at 434 (2009) (views of Rep. John

legislator, Congressman John F. Tierney, argued the MLR would require insurers to invest premium dollars on health services, noting that the "absence of regulation . . . reduced [health insurance companies'] spending on health services" from 95% of premium dollars into services in 1993 to 60% in 2008.[117] Congress justified the MLR by arguing that it would prevent health care premiums from being wasted on lavish spending on fancy administrative offices, corporate jets, and "padded expense accounts."[118]

The MLR passed as part of the ACA, with Congress charging the National Association of Insurance Commissioners ("NAIC"), a trade group representing state and territorial insurance regulators, with defining key provisions.[119] Congress sought to incorporate industry expertise into defining details of the MLR while maintaining the intent of the MLR—to make health insurance more consumer friendly, affordable, and accessible.[120] The plain text of the MLR provisions specify that insurance companies must spend a minimum percentage of premium revenues on health care and quality improvement activities: 80% for individual and small group market insurers, 85% for large group market insurers.[121] Implementation of the MLR was assigned to HHS.[122] To bridge divides between the insurance companies and advocates for lower health costs, the NAIC was tasked with "establish[ing] uniform definitions of the [MLR] activities," that is, "activities that improve

---

D. Rockefeller IV et al.); 157 CONG. REC. H11261 (daily ed. Feb. 18, 2011) (statement of Rep. John Tierney); 156 CONG. REC. H2432 (daily ed. Mar. 25, 2010) (statement of Rep. James R. Langevin).

[117] 157 CONG. REC. H267 (daily ed. Jan. 19, 2011).

[118] *See Delivering Better Health Care Value to Consumers: The First Three Years of the Medical Loss Ratio: Hearing Before the S. Comm. On Com., Sci., & Transp.*, 113th Cong. (2014).

[119] *See* 42 U.S.C. § 300gg–18; *Our Story*, NAIC, https://content.naic.org/about (last visited Nov. 27, 2021) [https://perma.cc/TV4J-AL9H].

[120] *See* Press Release, U.S. Senate Comm. on Com., Sci., & Transp., Rockefeller to NAIC Commissioners: Reject Health Care Industry's 11th Hour Lobbying Effort, U.S. S. COMM. ON COM., SCI., & TRANSP. (Oct. 14, 2010), https://www.commerce.senate.gov/2010/10/rockefeller-to-naic-commissioners-reject-health-care-industry-s-11th-hour-lobbying-effort [https://perma.cc/6XER-VZ3R].

[121] 42 U.S.C. § 300gg–18.

[122] *See id.*

health care quality."[123] The NAIC was also responsible for establishing "standardized methodologies for calculating measures for such activities."[124] The NAIC convened working groups to decide what would count toward quality improvement activities.[125]

The promulgation of qualifying expenditures under the MLR faced fierce, well-funded lobbying.[126] Insurers aggressively lobbied to influence what would count towards the MLR's minimum percentages required, attempting to "more easily meet the minimum requirements" of the MLR.[127] The debate ranged widely over what costs were eligible to count toward the MLR: from expenditures with ostensibly no clear relation to direct patient care, such as broker commissions[128] or payroll taxes, to expenditures more commonly associated with patient well-being, like disease management or wellness initiatives.[129] During the NAIC's deliberations over eligible expenditures, tense debate revolved around the elimination

---

[123] *See id.*

[124] *Id.*; *see also* Jost, *supra* note 111.

[125] Jost, *supra* note 111.

[126] *See* Robert Pear, *Health Insurance Companies Try to Shape Rules*, N.Y. TIMES (May 15, 2010), https://www.nytimes.com/2010/05/16/health/policy/16health.html [https://perma.cc/B9PU-68ME].

[127] Shelby Livingston, *The Medical Loss Ratio's Mixed Record.*, 50 MOD. HEALTHCARE 26 (Mar. 14, 2020) [https://perma.cc/45GA-XST7]; *see also* Katherine Hobson, *Insurance Brokers Lose Out in Final NAIC Recommendations*, WALL ST. J. (Oct. 21, 2010), https://www.wsj.com/articles/BL-HEB-42569 [https://perma.cc/FL6Q-US6B].

[128] Brokers sell health insurance policies on behalf of health insurance companies. Brokers earn a percentage of the insurance premium as a commission for each policy they sell. Marshall Allen, *Insurers Hand Out Cash and Gifts to Sway Brokers Who Sell Employer Health Plans*, NPR (Feb. 20, 2019), https://www.npr.org/sections/health-shots/2019/02/20/694719998/insurers-hand-out-cash-and-gifts-to-sway-brokers-who-sell-employer-health-plans [https://perma.cc/Z2Q6-EUXY]; *Agent Broker Compensation*, CMS, https://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/AgentBroker (last visited Feb. 13, 2022) [https://perma.cc/96NR-HBTE].

[129] *See* Emily P. Walker, *Debate Heats Up Over Medical Loss Ratios*, MEDPAGE TODAY (Aug. 16, 2010), https://www.medpagetoday.com/washington-watch/reform/21706 [https://perma.cc/E58Q-3KUH]; Timothy Jost, *The NAIC's Effort to Find Balance In Its Medical Loss Ratio Regulation*, KHN (Sept. 30, 2010), https://khn.org/news/093010jost/ [https://perma.cc/6KDD-Q65X]; Livingston, *supra* note 127, at 26.

of broker compensation; its elimination would satisfy a key goal of Congress' passage of the MLR, to force insurance companies to spend more money on activities that legitimately promoted health care quality.[130] Whether federal taxes are exempt from an insurance company's MLR calculation was also fiercely debated.[131] Categorical exemption of federal taxes would financially benefit insurance companies.[132] The controversy over taxes drew prominent attention, dragging the President and Congressional members into the fray as the health insurance lobby pleaded with the NAIC for a more lenient interpretation to exempt taxes from counting toward the MLR targets.[133] HHS' final rule excluded broker fees and allowed the deduction of federal taxes.[134]

In the years following the success of the ACA's MLR, nursing home patient advocates have increasingly called for a federal MLR for nursing homes.[135] A MLR for nursing homes would function in the same manner as the MLR for insurance companies.[136] It would cap profits, limit the amount of money diverted away from patient care to excessive administrative costs, and function as a consumer protection tool.[137] As the COVID-19 pandemic pushed the nation's healthcare system to the brink, tearing through nursing homes at a disproportionate rate, the political climate became amenable for state-level passage of a MLR for nursing homes, commonly referred to as a direct care ratio.

---

[130] *See* Sabrina Corlette, *NAIC Brings up Medical Loss Ratio Again*, GEO. U. HEALTH POL. INST. (Nov. 9, 2011), https://ccf.georgetown.edu/2011/11/09/_0_false_18_pt/ [https://perma.cc/U5DJ-VWNV].

[131] *See* Walker, *supra* note 129.

[132] *See id.*

[133] *See id.*; *Insurers at Odds with Lawmakers Over Rules on Medical-Loss Ratios*, CAL. HEALTHLINE (Aug. 13, 2010), https://californiahealthline.org/morning-breakout/insurers-at-odds-with-lawmakers-over-rules-on-medicalloss-ratios/ [https://perma.cc/R3LC-SNF7].

[134] *See* 45 C.F.R. § 158 (2021).

[135] *See* CTR. FOR MEDICARE ADVOC., *supra* note 19; *see also Center for Elder Law & Justice Comment for the Record Before the H.R. Comm. on Ways & Means*, 116th Cong. (2019) (statement of Center for Elder Law & Justice).

[136] *See* CTR. FOR MEDICARE ADVOC., *supra* note 19.

[137] *See id.*

III. STATE-BY-STATE COMPARISON OF DCRS FOR NURSING HOMES

This section provides a broad overview of state-level DCRs enacted in 2020 and 2021. As policy makers grapple with how to address systemic failures within our nation's nursing home industry, state-level DCRs can inform a national DCR. The lessons from the three states which instituted a DCR can inform future federal action. All three states' laws were passed as part of the states' attempts to quell public attention and outrage over COVID-19 and the nursing home crisis.[138] How these states implemented their laws—from New York's DCR permitting a wide range of allowable costs towards the 70% DCR requirement to Massachusetts' DCR with narrowly defined allowable costs—can inform crafting of a national DCR.[139] It is relevant that all three states which enacted a DCR also pledged a boost in Medicaid payments to aid facilities in complying with the DCR, an overture by the states to dilute criticism from a vocal nursing home lobby complaining of the burdensome costs for complying with the DCR.[140] This concern by the nursing home industry will likely be echoed on the federal level, too.

A. New Jersey

New Jersey debuted the "first-in-the-nation" DCR, mandating that facilities spend at least 90% of revenue on direct care

---

[138] *See* Jaffe, *supra* note 18.

[139] *See* N.Y. PUB. HEALTH LAW § 2828 (2021); *see also* Morgan McKay, *New York Nears Budget Agreement That Includes Nursing Home Reforms*, NY1 (Apr. 5, 2021), https://www.ny1.com/nyc/all-boroughs/politics/2021/04/05/ny-nears-a-budget-agreement-and-includes-nursing-home-reforms- [https://perma.cc/MA4C-GTVC]; 101 MASS. CODE REGS. 206.12 (2021); *see also* Press Release, Exec. Off. of Health & Hum. Servs., *Baker-Polito Administration Announces New Nursing Facility Accountability and Supports*, MASS.GOV (Sept. 10, 2020) https://www.mass.gov/news/baker-polito-administration-announces-new-nursing-facility-accountability-and-supports [https://perma.cc/GXV4-XPGC]; NURSING FACILITY TASK FORCE, NURSING FACILITY TASK FORCE FINAL REPORT (2020), https://www.mass.gov/doc/nursing-facility-task-force-final-report/download [https://perma.cc/JUF8-VVPE].

[140] *See* Jaffe, *supra* note 18.

services.[141] New Jersey's DCR was passed by the state legislature and signed into law by Governor Murphy in September 2020.[142] With a 90% DCR, New Jersey seeks to cap the amount of revenue facilities divert to "administrative costs or profits" at 10%.[143] Facilities which fail to comply with the 90% DCR requirement must pay a "dividend or credit to the State," as well as to "all individuals and entities making payments to the nursing home."[144]

New Jersey entrusts great authority to bureaucratic heads in implementing the DCR.[145] New Jersey's DCR grants its Commissioner of Human Services sole discretion to determine the qualifying costs that count toward the DCR requirement.[146] New Jersey affords its Commissioner the exclusive power to waive requirements in the DCR "as appropriate."[147] The statute allows the DCR requirements to be modified "based on [the] current financial information" of a nursing home—information that nursing homes self-report.[148] Investigations have shown nursing homes' self-interest in tailoring information reported to government bodies.[149]

---

[141] Press Release, Manatt, New Jersey Adopts Significant Nursing Home Legislative Reforms, (Sept. 16, 2020), https://www.manatt.com/insights/press-releases/2020/new-jersey-adopts-significant-nursing-home-legisla [https://perma.cc/S86D-GXSM].

[142] *See* N.J. STAT. § 30:4D-7cc (2020); *Governor Murphy Signs Legislation Requiring Reforms to Long-Term Care Industry*, OFF. SITE OF THE STATE OF N.J. (Oct. 23, 2020), https://www.nj.gov/governor/news/news/562020/20201023a.shtml [https://perma.cc/LB4A-SCF5].

[143] *See* Press Release, Manatt, *supra* note 141.

[144] N.J. STAT. § 30:4D-7cc (2021).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] Nursing homes are rated on a scale of one through five stars, a system to aid in the nursing home selection process. The ratings are based on self-reported information and inspections by the state. Since five-star facilities ostensibly offer higher quality care, they are more attractive to potential residents. One metric used in the rating scale is average staff-to-resident time. An analysis comparing self-reported data on the number of hours nurses spent with residents to payroll records logging nurses' hours suggests nursing homes were inflating staff-to-resident hours. Jessica Silver-Greenberg & Robert Gebeloff, *Maggots, Rape and Yet Five Stars: How U.S. Ratings of Nursing Homes Mislead the Public*, N.Y. TIMES (Mar.

The Commissioner also has the authority to modify DCR requirements based on "overall performance by the nursing home," a vague and undefined standard that broadly qualifies "patient safety and quality of care" as a metric.[150]

New Jersey's law was enacted following a private sector report commissioned by the state to analyze New Jersey's nursing homes and how COVID-19 impacted residents and facility staff.[151] The report[152] was commissioned partially in response to massive public outrage over the catastrophic number of COVID-19 deaths inside New Jersey's nursing homes.[153] The report, characterized by the New Jersey Governor as "exhaustive, in-depth" and "thorough,"

13, 2021), https://www.nytimes.com/2021/03/13/business/nursing-homes-ratings-medicare-covid.html [https://perma.cc/LE58-AHV3].

[150] N.J. STAT. § 30:4D-7cc (2021).

[151] Press Release, Manatt, Manatt Provides Recommendations to State of New Jersey Following Rapid Review of LTC Facilities (June 3, 2020), https://www.manatt.com/insights/press-releases/2020/manatt-provides-recommendations-to-state-of-new-je [https://perma.cc/U3W6-CJYX]; Press Release, New Jersey Governor's Off., Governor Murphy Announces Recommendations from Review of New Jersey's Long-Term Care Facilities (June 3, 2020), https://nj.gov/governor/news/news/562020/approved/20200603a.shtml [https://perma.cc/2W6Y-AHMQ]; Susan K. Livio & Ted Sherman, *A Behind-the-Scenes Battle Raged Between Top Murphy Aides Over $500K Contract as Nursing Home Deaths Mounted*, NJ.COM (May 29, 2020), https://www.nj.com/coronavirus/2020/05/a-behind-the-scenes-battle-raged-between-top-murphy-aides-over-500k-contract-as-nursing-home-deaths-mounted.html [https://perma.cc/FB9J-KBEY].

[152] The report was prepared by Manatt Health, a division of the lobbying and legal powerhouse Manatt, Phelps & Phillips. Manatt Health is regarded as a leader in legal and consulting services for the health care industry. *See* Press Release, Manatt, *supra* note 151; *The 2022 Health Care Power 100*, CITYANDSTATENY, https://www.cityandstateny.com/power-lists/2022/01/2022-health-care-power-100/361016/ (last visited Feb. 13, 2022) [https://perma.cc/2JA9-Y8ZY].

[153] *See* Ted Sherman, *As Deaths Rise, N.J. Retains Consultants to Examine Nursing Home Coronavirus Crisis*, NJ.COM (May 6, 2020), https://www.nj.com/coronavirus/2020/05/as-deaths-rise-nj-retains-consultants-to-examine-nursing-home-coronavirus-crisis.html [https://perma.cc/4YWG-TMKR]; Dustin Racioppi, *Coronavirus NJ: Secret Recording, Report 'Flaws' Bring Nursing Home Review Into Question*, NORTHJERSEY.COM, (June 15, 2020), https://www.northjersey.com/story/news/watchdog/2020/06/15/coronavirus-nj-health-officials-claim-flaws-nursing-home-review/5342044002/ [https://perma.cc/JTK7-CVDX].

took just three weeks to write.[154] Despite criticism over the report, it largely provided the "roadmap" for the reforms New Jersey would adopt to "improve quality, safety, and resilience within New Jersey's long-term care system."[155] Notably, one New Jersey official who aggressively pushed for the state to contract with the vendor ultimately selected to write the report, is the bureaucrat heading the office with the sole power to waive the requirements—the New Jersey Commissioner of Human Services.[156]

New Jersey coupled passage of its DCR with raising the minimum wage for nursing home staff by three dollars per hour, a priority of health care unions representing nursing home staff.[157] New Jersey also increased the Medicaid reimbursement rate for nursing homes by 10%, a priority of the nursing home lobby.[158] The Medicaid reimbursement increase can help offset the costs of complying with the DCR.

---

[154] Press Release, New Jersey Governor's Off., *supra* note 151; *see* Press Release, Manatt, *supra* note 151; Sherman, *supra* note 153.

[155] Press Release, New Jersey Governor's Off., *supra* note 151; *see* Sam Sutton, *Manatt report: New Jersey's Long-Term Care Industry in Need of Major Overhaul*, POLITICO (June 3, 2020), https://www.politico.com/states/new-jersey/story/2020/06/03/manatt-report-new-jerseys-long-term-care-industry-in-need-of-major-fixes-1290334 [https://perma.cc/QK4K-L4R9].

[156] *See* Racioppi, *supra* note 153; Livio & Sherman, *supra* note 151; N.J. STAT. § 30:4D-7cc (2021).

[157] *See NJ Lawmakers Approve $3 Pay Raises, $130M for Nursing Homes to Battle COVID-19*, N.J. HERALD (Aug. 28, 2020), https://www.njherald.com/story/news/2020/08/28/nj-lawmakers-approve-3-pay-raises-130m-for-nursing-homes-to-battle-covid-19/113596636/ [https://perma.cc/Y65J-YNYR]; Press Release, 1199SEIU, Nursing Home Workers to Join "Fight for $15" to Raise Wages, Improve Quality of Care (Apr. 12, 2016), https://www.seiu.org/2016/04/nursing-home-workers-to-join-fight-for-15-to-raise-wages-improve-quality-of-care [https://perma.cc/Y7G8-DG4C].

[158] *See* Mike Catalini, *NJ Enacts 4 Laws Aimed at Nursing Homes After Virus Response*, AP NEWS (Sept. 16, 2020), https://apnews.com/article/virus-outbreak-nursing-homes-new-jersey-62c1fc2d8fa00c9c18b2e41af42f5e82 [https://perma.cc/9TTM-C83V]; Lilo H. Stainton, *Questioning the Effect of Recent Wage Changes on NJ Nursing Homes*, NJ SPOTLIGHT NEWS (Feb. 12, 2020), https://www.njspotlightnews.org/2020/02/questioning-the-effect-of-recent-wage-changes-on-nj-nursing-homes/ [https://perma.cc/KW46-JTPK].

B. Massachusetts

In Massachusetts, a Direct Care Cost Quotient (referred to here as a DCR) was issued as a regulation by the Governor in September 2020.[159] It requires nursing homes to spend at least 75% of revenue on staffing, defined as "nursing, dietary, restorative therapy, or social worker staff expenses."[160] Massachusetts' regulation narrowly defines allowable costs eligible to count towards Massachusetts' DCR.[161] The Massachusetts regulation authorizes the Executive Office of Health and Human Services authority to "further detail . . . the types of staffing and direct care expenditures that qualify towards the [DCR]."[162] Massachusetts' DCR also includes the caveat that the government may further authorize additional "expenditures that qualify towards the [DCR]."[163]

Massachusetts' policy was guided by recommendations from a Nursing Facility Task Force established in 2019 comprised of bureaucrats, health care unions, elected officials, elder care advocates, and industry representatives.[164] The task force completed its report before the pandemic began, offering a DCR policy as a solution to "ensure higher quality care."[165] The report concluded that "[s]trengthen[ing] the quality of resident care" could be achieved by "requiring that a certain percentage of facility expenditures are directed towards . . . direct care costs."[166]

Unsurprisingly, industry association representatives on the task force used the inclusion of a DCR proposal in the report to leverage their advocacy for increased reimbursement rates.[167] Industry lobbyists in New Jersey and New York regularly make similar

---

[159] *See* 101 MASS. CODE REGS. 206.12 (2021); Press Release, Exec. Off. of Health & Hum. Servs., *supra* note 139.

[160] 101 MASS. CODE REGS. 206.12 (2021).

[161] *See id.*

[162] *Id.*

[163] *Id.*; Press Release, Exec. Off. of Health & Hum. Servs., *supra* note 139; NURSING FACILITY TASK FORCE, *supra* note 139.

[164] *See* NURSING FACILITY TASK FORCE, *supra* note 139, at 3–4; Press Release, Exec. Off. of Health & Hum. Servs., *supra* note 139.

[165] NURSING FACILITY TASK FORCE, *supra* note 139, at 37.

[166] *Id.* at 26.

[167] *See id.* at 34.

arguments—arguing that facilities can only invest more money in patient care following an increase in government funding.[168] The nursing home lobby frequently pushes back against legislative proposals to strengthen oversight of the industry by suggesting that these policies are unfeasible without an increase in reimbursement rates for Medicare and Medicaid, both of which largely fund nursing home operations.[169] This argument is hypocritical; without increased transparency detailing the flow of government monies from federal coffers to nursing homes to related-party transactions, it is unclear whether nursing homes are sincerely struggling financially.[170] Full transparency can inform whether an increase in government subsidies is needed to enable nursing homes to increase spending on patient care.[171] After all, "[p]rofit margins from Medicare reimbursements have been in the double digits" for two decades and "Medicaid rates have steadily increased" for the last

---

[168] *See Testimony Before The Joint Fiscal Committees Of The N.Y. State Leg.: Hearing On Health & Medicaid*, N.Y. ST. LEG. JOINT HEARING (N.Y. 2017) (statement of Michael A. L. Balboni on behalf of Greater New York Health Care Facilities Ass'n); Balboni, *supra* note 78; Press Release, Continuing Care Leadership Coalition et al., State Budget Must Provide Long Needed Support for New York's Medicaid Providers (Mar. 23, 2018), https://www.crainsnewyork.com/assets/pdf/CN114808323.PDF (arguing for increased reimbursement rates for nursing homes) [https://perma.cc/RA8G-B2L5]; Jaffe, *supra* note 18.

[169] *See* Musumeci & Chidambaram, *supra* note 35; *see also Medicaid's Role in Nursing Home Care*, KFF (June 2017), https://files.kff.org/attachment/Infographic-Medicaids-Role-in-Nursing-Home-Care [https://perma.cc/5H47-22AN] (explaining that most nursing home revenue derives from taxpayer funds, through Medicare and Medicaid).

[170] *See Nursing Home, Assisted Living, & Homecare Workforce – Challenges & Solutions Before the Sen. Comm. on Aging, Sen. Comm. on Health, & Sen. Comm. on Lab.*, 2021 Leg. 244th Sess. 1-7 (N.Y. 2021) (statement of Richard J. Mollot, Executive Director, Long Term Care Community Coalition). Related-party transactions are transactions where a nursing home owner has a relationship, familiar or other, to the company contracted with. For example, a nursing home owner who owns a laundry company that his nursing home contracts with to provide linen services; or where a nursing home owner hires a company, owned by his son, to provide consulting services to the nursing home. *See* N.Y. ATT'Y GEN., *supra* note 83, at 7, 49 (explaining related-party transactions and how nursing home owners "extract[s] significant profit" through related-party transactions).

[171] *See* N.Y. ATT'Y GEN., *supra* note 83, at 6.

decade, suggesting nursing homes are not in financial crisis under the current scheme and seemingly rendering the nursing home lobby's argument moot.[172]

C. New York

New York's DCR was passed by the state legislature and signed into law in April 2021.[173] The statute requires nursing homes and other residential health care facilities to spend a minimum of 70% of their revenue on direct patient care, with 40% devoted to "resident-facing staffing."[174] Critically, the statute broadly defines allowable activities that facilities may count towards the DCR requirement.[175] Allowable activities include everything from traditional residential care activities, like nursing services and physical therapy, to activities like laundry and linen services and plant operation and maintenance.[176] This broad definition encompasses ancillary and program services that may tangentially impact or benefit residents' care, and are services that for-profit nursing homes frequently hire outside contractors to provide; in some cases, contractors with direct familial relation to the nursing home's owner.[177]

In one egregious example of related-party transactions, a facility spent $14,480,286 of revenue over a three-year period in payments to parties related to the nursing home's operator.[178] That revenue included Medicaid and Medicare reimbursements, which the nursing home lobby frequently attempts to increase.[179] These actions were the subject of a state investigation and a criminal

---

[172] *See* Richard Mollot, *Nursing Homes Were a Disaster Waiting to Happen*, N.Y. TIMES (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/opinion/coronavirus-nursing-homes.html [https://perma.cc/8GHG-7R52].

[173] N.Y. PUB. HEALTH LAW § 2828 (2021).

[174] *Id.*

[175] *See id.* § 1(c).

[176] *Id.*

[177] *Id.*; N.Y. ATT'Y GEN., *supra* note 83, at 49.

[178] *See* N.Y. ATT'Y GEN., *supra* note 83, at 65–66.

[179] *See id.*; Press Release, Continuing Care Leadership Coalition et al., *supra* note 168 (arguing for increased reimbursement rates for nursing homes).

prosecution.[180] Another facility's actions were investigated by the New York Attorney General.[181] That facility similarly partakes in a high volume of related-party transactions, and despite New York state laws explicitly prohibiting the "improper delegation [of management] to the management consultant," this facility outsourced critical management decisions to an outside consultant at the height of the COVID-19 pandemic.[182]

New York's DCR, crafted in the aftermath of the New York Attorney General's devastating report detailing an alleged cover-up of nursing home deaths due to COVID-19, sought to tamp down public criticism over inadequate state oversight and regulation of the nursing home industry.[183] In seeking to force facilities to spend more revenue on direct patient care, the state legislature explicitly prohibited administrative costs from counting towards a facility's DCR, with the exception of nursing administrative costs.[184] This proscribes nursing homes from artificially inflating their DCR with monies not ostensibly benefiting its patient population.[185] New York's DCR also limits nursing homes' profit margins, requiring nursing homes earning profits in excess of 5% to remit the funds to the state.[186]

---

[180] N.Y. ATT'Y GEN., *supra* note 83; Press Release, New York Att'y Gen., A.G. Underwood Announces Guilty Pleas of Former Focus Otsego Nursing Home Operators for Endangering Resident (Sept. 12, 2018), https://ag.ny.gov/press-release/2018/ag-underwood-announces-guilty-pleas-former-focus-otsego-nursing-home-operators [https://perma.cc/GVZ7-FNLX].

[181] Peddie & Baumbach, *supra* note 56.

[182] N.Y. COMP. CODES R. & REGS. tit. 10, § 600.9 (2021); *Cold Spring Hills Center for Nursing & Rehab*, PATCH (2018), https://patch.com/new-york/syosset/directory/listing/46153/cold-spring-hills-center-for-nursing-rehab [https://perma.cc/46X3-64UM]; Baumbach et al., *supra* note 6.

[183] *See* Marina Villeneuve, *Reforms Follow Deadly Year in New York Nursing Homes*, ASSOCIATED PRESS (Apr. 10, 2021), https://apnews.com/article/new-york-andrew-cuomo-legislation-coronavirus-pandemic-state-budgets-f3d86162837392af618f44644932fdb5 [https://perma.cc/YFU9-KXDK]; N.Y. ATT'Y GEN., *supra* note 83.

[184] Press Release, New York State Senate, *supra* note 107; N.Y. PUB. HEALTH LAW § 2828 (2021).

[185] *See* Villeneuve, *supra* note 183.

[186] *See* N.Y. PUB. HEALTH LAW § 2828 (2021).

The NYSDOH is responsible for implementation of the law.[187] Key language allows the NYSDOH Commissioner to "promulgate regulations governing the disposition of revenue in excess of expenses,"[188] that under a nefarious interpretation may permit modifications to the DCR that conflict with the legislature's intent.[189] Similar to New Jersey, New York's DCR statute grants the Commissioner unfettered and sole discretion to "waive the requirements" of the law, that is, to exempt nursing homes from DCR requirements.[190] In "unexpected or exceptional circumstances," the Commissioner may waive facilities from complying with the statute, only requiring the Commissioner to notify the state long-term care ombudsman,[191] a patient advocate, and the chairpersons of the legislative health committees.[192] Critics of this provision question the independence of the NYSDOH from the industry.[193] The NYSDOH has not been immune to criticism

---

[187] *Id.* In November 2021, DOH published proposed regulations for comment in the State Register to implement the DCR, but just prior to the proposed regulations being published, the DOH testified before the DOH's Public Health and Health Planning Council—the entity charged with approving nursing homes certificate of needs applications and approving or denying the establishment of new facilities and the transfer of existing facilities—that the DCR adequately enumerated the requirements and subsequent regulations may not be necessary. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.34 (proposed Nov. 17, 2021); Archived Webcast: NY Department of Health Committee on Codes, Regulations and Legislation and Full Public Health and Health Planning Council Meeting (Oct. 7, 2021) (https://www.health.ny.gov/events/webcasts/archive/).

[188] N.Y. PUB. HEALTH LAW § 2828 (2021).

[189] *See id.*

[190] *Id.*; N.J. STAT. ANN. § 30:4D-7cc (2021).

[191] N.Y. PUB. HEALTH LAW § 2828 (2021). A nursing home ombudsman is an advocate for residents of a nursing home, helping defend their basic rights, handle complaints related to neglect and poor standards of care, and liaison between residents' families and the government. *What Is a Nursing Home Ombudsman*, NURSING HOME ABUSE JUST., https://www.nursinghomeabuse.org/nursing-home-abuse/ombudsman/ (last visited Mar. 20, 2022) [https://perma.cc/V4UB-QV9E].

[192] N.Y. PUB. HEALTH LAW § 2828 (2021).

[193] *See* Press Release, Long Term Care Community Coalition, Time for Quality Assurance, Accountability, & Reform (Sept. 10, 2021), https://nursinghome411.org/wp-content/uploads/2021/09/LTCCC-Statement-NY-Nursing-Home-Reform-2021.pdf [https://perma.cc/L8GF-7PB3].

when it fails to unequivocally act in the best interest of the public.[194] The NYSDOH's Commissioner serves at the behest of the Governor and has in the past made decisions in the best interest of the Governor, not nursing home residents.[195]

IV. LEGISLATIVE SOLUTION: A NATIONAL DCR

The most effective way to rein in America's nursing home industry and standardize rules that vary widely among states is for Congress to institute sweeping reforms on the federal level. Medicaid, a taxpayer-subsidized program, is the main funding source for long-term care in the United States, accounting for $55 billion of the revenue that supported nursing homes in 2015.[196] Thus, the federal government has a vested interest, and the legal authority, under the Commerce Clause, to regulate the standards governing the care of society's most vulnerable citizens, the elderly and the sick, who comprise the majority of America's nursing home population.[197]

Congress can act by passing a national DCR for nursing homes. Congress should adopt a revenue-focused approach, capping the amount of money that facilities can extract from nursing homes and mandating a minimum amount of revenue that must be spent on direct patient care. Congress can benefit from the lessons learned during implementation of the MLR, as well as from states that have already enacted a DCR for nursing homes. This section outlines the case for a national DCR.

---

[194] *See* Chris Churchill, *Churchill: Howard Zucker Should Have Been Fired After Hoosick Falls*, TIMES UNION (Sept. 25, 2021), https://www.timesunion.com/churchill/article/Churchill-Zucker-should-have-been-fired-after-16485246.php [https://perma.cc/F4SS-LX2B].

[195] *See* J. David Goodman et al., *Cuomo Aides Spent Months Hiding Nursing Home Death Toll*, N.Y. TIMES (Apr. 28, 2021), https://www.nytimes.com/2021/04/28/nyregion/cuomo-aides-nursing-home-deaths.html [https://perma.cc/7VXN-SC9E].

[196] *See* KFF, *supra* note 169.

[197] *See* Hall Dykgraaf et al., *supra* note 51, at 1969; Stubblebine, *supra* note 32, at 346.

A. Precedence for a National DCR

The last time Congress took bold action to address the glaring crises within the nation's nursing homes was 1987.[198] That legislation, the Nursing Home Reform Act, set federal quality standards for nursing homes by specifying what services must be provided to residents, established the federal-state partnership for enforcement, and created a nursing home residents bill of rights.[199] As the business of nursing homes evolved, largely through the growth of for-profit nursing homes heavily subsidized by government funds, those 1987 reforms have grown stale. Now, with nearly 70% of nursing homes under for-profit ownership,[200] and private-equity-owned nursing homes "explod[ing] . . . from $5 billion in 2000 to more than $100 billion in 2018,"[201] federal law must match the ferocity with which private equity and chain corporate ownership have come to dominate the nursing home industry.[202]

The nursing home industry is the chief critic opposing requirements for additional spending on direct patient care.[203] They argue nursing homes cannot afford to spend more without an

---

198 *Broken and Beyond Repair: Recommendations to Reform the Survey and Certification System*, AM. ASS'N OF HOMES & SERVS. FOR THE AGING (June 2008), https://www.leadingage.org/sites/default/files/SCTF_Report_FINAL.pdf.

199 Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act*, AARP (Feb. 2001), https://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html [https://perma.cc/Z5QW-66WV]; *Nursing Home Reform Act of 1987*, NURSING HOME ABUSE CTR., https://www.nursinghomeabusecenter.com/resources/nursing-home-reform-act/ (last visited Nov. 27, 2021) [https://perma.cc/XET9-M2CP].

200 CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 22.

201 Dylan Scott, *Private Equity Ownership is Killing People at Nursing Homes*, VOX (Feb. 22, 2021), https://www.vox.com/policy-and-politics/22295461/nursing-home-deaths-private-equity-firms [https://perma.cc/3LCJ-WME8].

202 *See* Charlene Harrington et al., *Marketization in Long-Term Care: A Cross-Country Comparison of Large For-Profit Nursing Home Chains*, 10 HEALTH SERV. INSIGHTS 1 (2017).

203 *See* Karen Dewitt, *NY Lawmakers Mandate Minimum Staffing for Nursing Homes, Hospitals*, WAMC (May 4, 2021), https://www.wamc.org/new-york-news/2021-05-04/ny-lawmakers-mandate-minimum-staffing-for-nursing-homes-hospitals [https://perma.cc/B2PD-3SBL].

increase in government funding, namely Medicaid reimbursements, a claim they use to justify regular requests for increased Medicaid reimbursements.[204] Yet, Medicaid reimbursements have "steadily increased" over the past decade,[205] and nursing homes' balance sheets hardly embody transparency, preventing a true evaluation of the fiscal state of facilities.[206]

While the nursing home industry decries the purported cost of complying with DCRs, data reveals a starkly different picture: a lawsuit by 239 New York nursing homes seeking to prevent implementation of the state's DCR shows those facilities earned excess income of more than $510 million in 2019—surplusage income beyond the DCR's requirement of 70% spending on direct patient care.[207] Seventy-three percent of the facilities suing provide inadequate nurse staffing levels to meet resident's clinic needs; the $510 million in excess income could have funded 5,600 full-time Registered Nurses.[208]

Aside from the fact public monies are the main funding source for nursing homes, a simpler reason for enacting a national DCR exists; the purpose behind the existence of nursing homes does not differ from state-to-state. Nursing homes from California to New York to Wyoming all share a common purpose: they are designed to care for the elderly and the medically vulnerable. A national DCR will standardize the nation's current patchwork of regulation—where fifty individual states are dictating fifty distinct sets of standards for the nursing homes in their jurisdiction—by setting a minimum baseline of standards for all nursing homes to meet. Similarly, it will ensure equal directives from those charged with

---

[204] *See id.*

[205] *See* Mollot, *supra* note 172.

[206] *See supra* Part III, Subsection A (discussing of lack of transparency as a result of related-party transactions). Regardless of the current spending by nursing homes on patient care, the overall quality of care and conditions within facilities demands an increase in spending on direct patient care. *See* Sedensky & Condon, *supra* note 44 (discussing particularly egregious conditions some residents endure within America's nursing homes).

[207] *LTCCC Alert: NY Nursing Homes Admit Excess Profits*, LONG TERM CARE CMTY. COAL. (Jan. 21, 2022), https://nursinghome411.org/nys-provider-lawsuit/ [https://perma.cc/22RC-H95Y].

[208] *Id.*

nursing home oversight within states, including the NYSDOH and the Massachusetts Executive Office of Health and Human Services.[209]

In adopting a national DCR, Congress will be acting squarely within its domain to regulate goods or activity under the Commerce Clause.[210] Supreme Court jurisprudence has consistently held Congress has the broad authority to regulate things that move through interstate commerce.[211] This includes health care. Moreover, the legality of a DCR has effectively been established through the MLR provision of the ACA, which has not endured the bitter legal challenges other provisions of the ACA encountered.[212] Despite consequential rulings narrowing the ACA, the Supreme Court has not limited Congress's power under the Commerce Clause to act with legislating the MLR.[213]

B. Crafting a National DCR

Congress should enact a national DCR and its broad framework and charge HHS with its implementation, using lessons from state-level DCRs and the successful implementation by HHS of the ACA's MLR. A DCR will "prevent unscrupulous providers from pocketing funds needed for resident care."[214] Congress should adopt a DCR with a strict requirement of at least 85%, close to New Jersey's DCR of 90%.[215] Congress should also enumerate the general categories that may count towards the DCR, unlike New York's DCR that permits a wide range of qualifying costs, including

---

[209] *See* N.Y. PUB. HEALTH LAW § 2828 (2021); 101 MASS. CODE REGS. 206.12 (2021).

[210] *See* Stubblebine, *supra* note 32, at 357–61; Cordner, *supra* note 32, at 249.

[211] *See, e.g.*, Citizens Bank v. Alafabco, 539 U.S. 52, 57 (2003); Heart of Atlanta Motel v. U.S., 379 U.S. 241, 255–58 (1964).

[212] *See* Stubblebine, *supra* note 32, at 357–61.

[213] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Stubblebine, *supra* note 32, at 343–44.

[214] *See* Nina A. Kohn, *Long-Term Care After COVID: A Roadmap for Law Reform*, BILL OF HEALTH (June 2, 2021), https://blog.petrieflom.law.harvard.edu/2021/06/02/long-term-care-covid-reform/ [https://perma.cc/U3PT-WELV].

[215] *See* N.J. STAT. ANN. § 30:4D-7cc (2021).

some that may only tangentially benefit residents' care.[216] These general categories should include "nursing care" and "rehabilitative services."

Congress should authorize HHS to promulgate regulations that narrowly define allowable costs that can count towards these general categories. Delegating the power to promulgate these general categories via regulation to a federal agency, versus codifying them through statute, will permit flexibility in modifications to adapt to the nursing home industry's ever-changing landscape. These costs should be reported in the annual cost reports nursing facilities that accept Medicare payments are required to file with the Centers for Medicare and Medicaid, to promote transparency and allow comparisons across nursing homes of reported costs.

The nursing home lobby argues a DCR is a "one-size-fits-all approach."[217] In particular, the nursing home industry claims a DCR will disincentivize capital investments; presumably a DCR will not allow capital expenses to count towards the DCR requirement, since a DCR intends to increase spending on direct patient care.[218] Yet, even under New York's lower 70% DCR, two-thirds of New York nursing homes would have had "excess income of over $510 million" if New York's DCR was in place in 2019, excess income beyond the DCR that can be used towards capital expenses.[219] Nonetheless, Congress can benefit from HHS' experience in crafting and implementing the MLR and should direct HHS to consider independent stakeholders' input, similar to the NAIC's input for the MLR definitions, to deliberate over permissible costs towards the DCR.[220]

In 2010, Congress took what had been up until then a state-level public health policy for insurers, the MLR, and codified the policy into a national law.[221] Here too, Congress should follow the lead of state-level DCRs and pass a national DCR for nursing homes. It is

---

[216] *See* Jaffe, *supra* note 18, at 2.

[217] Tom Dinki, *Nursing Home Profit Cap Included in New York State Budget*, WBFO (Apr. 8, 2021), https://www.wbfo.org/state/2021-04-08/nursing-home-profit-cap-included-in-new-york-state-budget [https://perma.cc/EXM7-AXNV].

[218] *Id.*; Balboni, *supra* note 78; Jaffe, *supra* note 18.

[219] *See LTCCC Alert*, *supra* note 207.

[220] Jost, *supra* note 111, at 3.

[221] *See* Kirchoff, *supra* note 111, at 2.

precisely the "hodgepodge" of fifty "uneven state rules" with a "persistent lack of enforcement" which demands a federal solution.[222] The states' failure to effectively act on the federal government's behalf in regulating nursing homes evidences the need for a national DCR.[223] This nation cannot wait for fifty various states to muster the courage to defy the nursing home lobby and enact fifty discrete state-level DCRs.

It is difficult to reconcile that the business of running nursing homes is as unviable, unprofitable, and unsustainable as the nursing home lobby professes, claiming "facilities . . . struggling, buildings closing, companies declaring bankruptcies and the sector . . . preparing for the coming gray tsunami."[224] Pre-pandemic nursing homes were considered a "goldmine" investment.[225] How, then, can such a goldmine investment be as financially unviable as the nursing home lobby would have one believe?

CONCLUSION

Recent government investigations and media reports document instances of fraud, patient abuse, and waste of taxpayer funds in New York's nursing homes—nearly identical findings as those uncovered from investigations in the 1960s.[226] Despite the passage of half a century, those residing in America's nursing homes remain acutely exposed to, and suffer as a result of, the same problems and lack of oversight that nursing home residents in the 1960s

---

[222] Jaffe, *supra* note 17.

[223] *See id.*; *see also Caring for Aging Americans Before the H.R. Comm. on Ways & Means*, 116th Cong. (2019) (statement of Richard J. Mollot, Executive Director, Long Term Care Community Coalition).

[224] James M. Berklan, *Now Nursing Homes Have to Put Up With This?*, MCKNIGHTS (Aug. 22, 2018), https://www.mcknights.com/daily-editors-notes/now-nursing-homes-have-to-put-up-with-this/ [https://perma.cc/4HAW-F2CJ].

[225] Isaac Finn, *US Nursing Homes: A Goldmine for Real Estate and Private Equity Firms*, WORLD SOCIALIST WEB SITE (Apr. 27, 2020), https://www.wsws.org/en/articles/2020/04/27/nur2-a27.html [https://perma.cc/DRC4-9LHN].

[226] *See* Abramo & Lehman, *supra* note 26; N.Y. ATT'Y GEN., *supra* note 83; Hynes, *supra* note 1, at 127–35.

endured.[227] Our nation is once again facing a "catastrophic"[228] crisis of care. The federal government can seize this opportunity to expand the social safety net, like it did in 1935 with passage of the Social Security Act, by passing a national DCR to regulate the nation's 15,600 nursing homes.[229]

State governments have demonstrated themselves unable and unwilling to enact true reforms to protect society's nursing home population.[230] Congress must step in to fill the void. The most effective way to regulate this nation's complex nursing home industry is through comprehensive and uniform federal standards, rather than the current "hodgepodge of uneven state rules."[231]

Congress should use its power of the purse "to incentivize better care" for nursing homes that are funded predominantly by public monies.[232] DCRs are a "direct response to the devastating toll COVID-19 has taken on nursing home residents," but the issues the pandemic highlighted did not "beg[in] during the pandemic; the pandemic merely called attention to them."[233] A national DCR will set a baseline of standards for addressing these issues that chronically plague the nation's nursing homes and set desperately needed guardrails to protect nursing home residents.[234] It will also persuade, albeit by mandate, nursing home owners to spend more

---

[227] *See* John L. Hess, *Nursing Homes Use a Variety of Fiscal Ruses to Lift Profits Above the 10% Allowed by Law*, N.Y. TIMES (Oct. 8, 1974), https://www.nytimes.com/1974/10/08/archives/nursing-homes-use-a-variety-of-fiscal-ruses-to-lift-profits-above.html [https://perma.cc/4PH7-SJYX]; Matthew Goldstein et al., *Push for Profits Left Nursing Homes Struggling to Provide Care*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/business/coronavirus-nursing-homes.html [https://perma.cc/6DC7-LWT7].

[228] *See* THE LONG TERM CARE CMTY. COAL., *supra* note 30.

[229] CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 22.

[230] *See supra* Part III (discussing that only three of the nation's fifty states have enacted a DCR in the face of the COVID-19 pandemic).

[231] Jaffe, *supra* note 17.

[232] Kohn, *supra* note 214.

[233] Leah Judge, *Three States Impose Profit Limits on Nursing Homes*, CONSTANTINE CANNON LLP (Oct. 29, 2021), https://www.lexology.com/library/detail.aspx?g=8a2a79e9-b815-4c51-8972-f9aaf79fb9c8 [https://perma.cc/7AA5-USET].

[234] *See supra* Part IV.

money directly attending to the residents entrusted in their care.[235] Nursing homes have repeatedly put profits over patient care.[236] A national DCR will remedy this. "The way leaders respond to the horrific toll the pandemic has taken on nursing home residents will determine the future of nursing home care for years, possibly decades, to come."[237]

---

[235] *See supra* Parts III–IV.

[236] *See* Steve Maugeri, *New York State to Limit Profits and Regulate Spending for Nursing Homes*, CBS6 ALBANY (Apr. 15, 2021), https://cbs6albany.com/news/local/new-york-state-to-limit-profits-and-regulate-spending-for-nursing-homes [https://perma.cc/GDQ9-E2RN].

[237] Birnstengel, *supra* note 62.