

No. 18-1779

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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

v.

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

Appeal from a Decision of the United States District Court for the
District of Massachusetts, Honorable Douglas P. Woodlock
Case No. 1:16-cv-10525-DPW

**CORRECTED BRIEF OF AMICI CURIAE AARP
AND AARP FOUNDATION
IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL**

William Alvarado Rivera*
Meryl D. Grenadier
Kelly R. Bagby
AARP Foundation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2137
* *Counsel of Record*
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and 1ST CIR. R. 29(a)(4)(A), amici curiae AARP and AARP Foundation submit the following corporate disclosure statement:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

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**STATEMENT OF THE IDENTITIES
AND INTERESTS OF AMICI CURIAE¹**

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

Among other things, AARP and AARP Foundation (collectively, “Amici”) fight to protect the rights of nursing facility residents to obtain judicial redress when they have been victims of neglect or abuse. Amici have filed amicus briefs in many state and federal cases that challenged the enforceability of pre-dispute arbitration clauses in long term care, consumer, and employment contracts. *See, e.g., Kindred Nursing Ctrs Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017); *Taylor v.*

¹ Amici curiae certify that no party or party’s counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Amici curiae also certify that no person, other than themselves, their respective members, and their undersigned counsel, contributed money intended to prepare or submit this brief.

Both Appellant and Appellees have consented to the filing of this brief. FED. R. APP. P. 29(a)(2) and 1ST CIR. R. 29(a)(2).

Extendicare Health Facilities, Inc., 637 Pa. 163, 147 A.3d 490 (Penn. 2015);
Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752 (Fla. 2013); *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, 304 P.3d 409 (N.M. 2013).

SUMMARY OF THE ARGUMENT

Decisions regarding admission to a nursing facility are typically made in the midst of crisis brought on by an abrupt deterioration in the health of a family member. In these situations, it is often difficult to contemplate disputes that may later arise between the resident or her family and the nursing facility, including those that arise from issues like abuse, assault, malnutrition, neglect, and – as in this case – death. Several state courts have held that agreements to arbitrate such disputes cannot bind wrongful death claimants who did not sign the agreement on their own behalf. Such rulings are consistent with the law in Massachusetts, as well as the Supreme Court’s holding that “a court may order arbitration of a particular dispute only when satisfied that the parties agreed to arbitrate *that dispute*.”

Granite Rock Co. v. Int’l Bhd. Of Teamsters, 561 U.S. 287, 288 (2010) (emphasis in original).

The right to a trial is particularly important in wrongful death actions because of the prevalence and severity of abuse and neglect in nursing facilities and regulatory agencies’ inability to protect residents from harm. Nursing facility residents and their families need the full range of mechanisms available to ensure

that robust public information is available to prospective residents and their families, and so that advocates can work to ensure that nursing facility residents are treated with the level of respect and dignity they deserve. This includes the right to litigate in open court.

ARGUMENT

I. ARBITRATION SHOULD NOT BE COMPELLED AGAINST A THIRD PARTY WHEN THE THIRD PARTY’S CLAIM IS INDEPENDENT OF THE CLAIM THAT WOULD HAVE BEEN BROUGHT BY A DECEDENT.

Courts have observed that wrongful death statutes generally fall into two categories: “pure” wrongful death statutes that create a new or distinct cause of action for survivors of the decedent based on the survivor’s loss, and “survival” statutes that allow the decedent’s cause of action to survive their death and be recovered through the decedent’s estate. *Wood v. Greenfield Assisted Living of Memphis, LLC*, No. 15-cv-02151-SHL-tmp, 2015 U.S. Dist. LEXIS 179186, at *13 n.4 (W.D. Tenn. June 22, 2015). In jurisdictions with statutes that create a “pure” wrongful death action, such an action is considered to be “independent” of the claim of the decedent, while in jurisdictions with statutes that create survival wrongful death actions, such claims are considered “derivative” of the decedent’s claim. The fundamental questions presented here is whether Massachusetts wrongful death actions are independent or derivative, and whether a non-signatory beneficiary is bound by an arbitration agreement signed by the decedent.

Here, the district court properly acknowledged that Jackalyn Schrader, as the representative of her mother Emma Schrader's estate, was a non-party to the arbitration provisions at issue.² *GGNSC Chestnut Hill LLC v. Schrader*, No. 16-10525-DPW, 2018 U.S. Dist. LEXIS 55189, at *14-16 (D. Mass. March 31, 2018). However, the district court erred in its analysis of Massachusetts's wrongful death action by failing to acknowledge that such claims are independent, with distinct procedural rights and remedies. As a result, the district court improperly held that Emma Schrader's agreement to arbitrate was binding on her daughter Jackalyn Schrader, who, in her capacity as representative of Emma Schrader's estate, brought a wrongful death claim for the benefit of Emma's heirs.

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

As the district court recognized, the issue here – whether an arbitration agreement between a deceased nursing facility resident and the nursing facility can bind the decedent's heirs – is a state-specific inquiry. *Schrader*, 2018 U.S. Dist. LEXIS 55189, at *15 (“In determining the scope of the [arbitration] agreement, I must apply ordinary state law principles governing the formation of contracts.”). There are several aspects of a Massachusetts wrongful death claim that indicate it is independent, and thus not subject to arbitration. First, the Massachusetts

² Amici do not address the validity of the arbitration agreement in this brief.

wrongful death statute itself, consistent with its common law origins, is not limited to only those claims that the decedent could have recovered for had she lived. *See* MASS. GEN. L. CH. 229, § 2 (listing five distinct bases for liability, only two of which require that the deceased could have recovered for personal injuries had his death not resulted). Second, although wrongful death cases are brought by a representative of the estate, such claims are “in a very real sense ... the [beneficiaries’] cause of action.” *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222, 230 (Mass. 1972). Third, the action does not accrue until the time of death, again counseling that the claim is distinct, belonging solely to the decedent’s beneficiaries. *Sisson v. Lhowe*, 460 Mass. 705, 954 N.E.2d 1115, 1117 (Mass. 2011). Finally, the damages available differ from those available to the decedent or her estate, and any damages recovered inure to the statutory beneficiaries through a trust. *Miga v. Holyoke*, 398 Mass. 343, 497 N.E.2d 1, 6 n.10 (Mass. 1986); *Sullivan v. Goulette*, 344 Mass. 307, 182 N.E.2d 519, 523 (Mass. 1962).

Indeed, Massachusetts courts consistently hold that a wrongful death claim is a separate and distinct cause of action from claims that are brought by and on behalf of the decedent’s estate. *See, e.g., Pobieglo v. Monsanto Co.*, 402 Mass. 112, 521 N.E.2d 728, 732 (Mass. 1988) (holding that claims for wrongful death and claims for conscious pain and suffering are “separate causes of action”); *Klairmont v. Gainsboro Rest., Inc.*, 465 Mass. 165, 987 N.E.2d 1247, 1257-58

(Mass. 2013) (“The [consumer protection] claim alleged by the plaintiffs on behalf of the estate is therefore a distinct cause of action separate and apart from the wrongful death cause of action alleging common-law claims.”); *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380, 713 N.E.2d 975, 977 n.4, 984 (Mass. App. Ct. 1999) (permitting parallel claims under wrongful death act and Massachusetts consumer protection law).

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

The district court indicated that there is “no uniformity among courts throughout the country[,]” but determined that “the weight of persuasive authority treats wrongful death claims as derivative.” *Schrader*, 2018 U.S. Dist. LEXIS 55189, at *20. Although it is true that a majority of states have derivative wrongful death actions, the district court erred in its analysis of Massachusetts’ wrongful death statute, which is more in line with the independent jurisdictions.

Furthermore, there are more states in the minority – where wrongful death actions are “pure” and thus independent - than the district court acknowledged. *Id.* at *22 (citing two cases, one from Pennsylvania and one from Ohio). Indeed, there are at least ten jurisdictions where courts have held that beneficiaries cannot be compelled to arbitrate their wrongful death claims under agreements signed by or on behalf of a decedent, including: Arizona, Illinois, Kentucky, Maryland,

Missouri, Ohio, Oklahoma, Pennsylvania, Utah, and Washington. Many of these courts addressed this question in the precise circumstances presented here: where an arbitration provision was signed by or on behalf of a resident in a nursing facility at the time of admission, and a subsequent wrongful death action against the facility was brought by the heirs of the deceased resident. Because the wrongful death statutes in these states are similar to Massachusetts, the analysis those courts engaged in is instructive.

For example, in *Ping v. Beverly Enters.*, the Kentucky Supreme Court addressed this issue in a wrongful death case brought against a nursing facility by the administrator of the deceased resident's estate. 376 S.W.3d 581, 597 (Ky. 2012). The Kentucky wrongful death statute, like the Massachusetts statute, creates liability "[w]henver the death of a person results from an injury inflicted by the negligence or wrongful act of another..." KY. REV. STAT. § 411.130; *see also* MASS. GEN. L. CH. 229, § 2 ("A person who (1) by his negligence causes the death of a person... shall be liable in damages..."). The Kentucky Supreme Court determined that the decedent "could have agreed to arbitrate *her* claims against [the facility]... and the Estate bringing those claims in her stead would likewise have been bound by her agreement[.]" but "[b]ecause under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for

their own pecuniary loss, we agree... that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.” *Ping*, 376 S.W.3d at 599. That court went on to note that “[e]ven were her mother’s agreement valid, Ms. Ping’s having executed it as her mother’s representative would not preclude Ms. Ping, as the representative of the wrongful death beneficiaries, from litigating their entirely separate claim.” *Id.* at 599. The result should be the same in this case.

Similarly, in *Peters v. Columbus Steel Castings Co.*, the Supreme Court of Ohio held that a wrongful death action is independent of the decedent’s claims and a decedent cannot bind his or her beneficiaries to arbitration, even though – like in Massachusetts – the same nominal party prosecutes both actions. 115 Ohio St. 3d 134, 873 N.E.2d 1258, 1262 (Ohio 2007). The Ohio wrongful death statute is more restrictive than Massachusetts’s, limiting claims to those “[w]hen the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action to recover damages if death had not ensued....” OHIO REV. CODE § 2125.01. Nevertheless, the court analyzed what it deemed “the separate nature of survival claims and wrongful death claims[.]” 873 N.E.2d at 1261. The court compared survival and wrongful death actions in Ohio and noted, like in Massachusetts, “a wrongful-death claim belongs to the decedent’s beneficiaries” and is for their “*exclusive benefit.*” *Id.* (citing OHIO REV. CODE § 2125.02(A)(2)) (emphasis in original). The court held that the decedent “could not

restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims[.]” *Peters*, 873 N.E.2d at 1262.

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

those actions arise out of a common tortious act.”); *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660, 663 (Penn. Super. Ct. 2013) (holding the administrator of the decedent’s estate could not be compelled to arbitrate a wrongful death claim, noting that “wrongful death actions are derivative of decedents’ injuries but are not derivative of decedents’ rights.”); *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, 976 N.E.2d 344, 354 (Ill. 2012) (beneficiary could not be compelled to arbitrate a wrongful death claim under an arbitration provision signed by the decedent and a nursing facility because such a claim did not belong to the decedent); *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252, 1258 (Wash. Ct. App. 2010) (holding wrongful death claims are independent claims that fall outside the scope of an agreement to arbitrate between a decedent and a nursing facility, and noting that “the action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased.”); *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 529 (Mo. 2009) (holding that the adult children of a nursing home resident, including the adult child who had signed the agreement containing the arbitration provision at issue on behalf of her mother, could not be compelled to arbitrate a wrongful death claim because the wrongful death statute created a “new” cause of action that did not belong to the deceased).

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

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

In contrast to the cases described above, there are several courts that have found wrongful death actions to be wholly derivative of a decedent’s claims, and thus subject to an arbitration agreement between the decedent and the defendant. The district court identified a few of these opinions. *Schrader*, 2018 U.S. Dist.

LEXIS 55189, at *20-22. In these jurisdictions, the legislature has determined that – unlike in Massachusetts – the only available action under the wrongful death statute is one where beneficiaries stand in the shoes of the decedent, and thus wrongful death claims are wholly derivative in the sense that they can *only* be brought if the decedent would have been entitled to maintain an action for the underlying injury prior to death. *See, e.g., In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009) (“it is well established that statutory wrongful death beneficiaries’ claims place them in the exact ‘legal shoes’ of the decedent...”); *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 288 (M.D.N.C. 2005) (under North Carolina’s wrongful death statute, such actions are legally derivative of a decedent’s own ability to recovery, because they “exist if and only if the decedent could have maintained an action for negligence or some other misconduct if she had survived.”); *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (compelling arbitration where the wrongful death statute was limited to situations in which the decedent could have recovered damages had death not ensued, and “the estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases.”).

California, another state identified by the district court as treating wrongful death claims as derivative and requiring arbitration, actually has unique reasons for

doing so, further highlighting the state-specific nature of this inquiry. *See Ruiz v. Podolsky*, 50 Cal. 4th 838, 237 P.3d 584, 591 (Cal. 2010) (compelling arbitration of wrongful death claim against a nursing home despite the “independent” nature of wrongful death claim, because the California Medical Injury Reform Act of 1975 permits patients who sign arbitration agreements to bind their heirs in wrongful death actions.). These states are not analogous to the wrongful death action available in Massachusetts.

II. THE RIGHT TO ACCESS THE COURTS IS CRITICAL TO NURSING FACILITY RESIDENTS AND THEIR BENEFICIARIES BECAUSE OF THE HIGH INCIDENCE OF ABUSE AND NEGLECT IN NURSING FACILITIES AND THE FAILURE OF REGULATORY ENFORCEMENT TO PROTECT RESIDENTS.

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

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

Nursing home residents are highly vulnerable to abuse and neglect because they are dependent on others to perform activities of daily living, and they are often isolated from their social networks. *See* Kjersti Lisbeth Braaten and Wenche Malmedal, *Preventing Physical Abuse of Nursing Home Residents- As Seen From the Nursing Staff's Perspective*, *Nursing Open* (2017), <https://doi.org/10.1002/nop2.98>. In 2014, 44% of nursing facility residents surveyed said that they had personally been abused, 95% said that they had been neglected or had witnessed neglect of another resident. *See* Richard Weinmeyer, *Statutes to Combat Elder Abuse in Nursing Homes*, 16 *AMA J. OF ETHICS* 359, 360 (2014), <https://journalofethics.ama-assn.org/article/statutes-combat-elder-abuse-nursing-homes/2014-05>. Nursing facility staff corroborate the high levels of elder abuse, with over 50% admitting to subjecting older patients to physical violence, mental abuse, or neglect. *See* Merav Ben Natan & Ariela Lowenstein, *Study of Factors That Affect Abuse of Older People in Nursing Homes*, 17 *J. NURSING MGMT.* 20, 22 (2010).

In Massachusetts, there were 9,800 confirmed abuse and neglect cases in 2017, an increase of nearly 40% since 2015. Paul Singer, *New National Data Shows 'Crisis' Of Elder Abuse*, *WGBH News*, (May 7, 2018), <https://www.wgbh.org/news/national-news/2018/05/07/new-national-data-shows->

crisis-of-elder-abuse. Last year, a hidden camera recorded two aides physically abusing a 93-year-old living in a Massachusetts nursing facility. Fox25Boston.com, *Hidden camera catches nursing aides allegedly abusing 93-year old woman*, WFTV9, (Mar. 16, 2017; 11:00 AM), <https://www.wftv.com/news/trending-now/hidden-camera-catches-nursing-aides-allegedly-abusing-93year-old-woman/503535641>.

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

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

Despite the mandatory nature of minimum standards of care provided in the 1987 Omnibus Budget Reconciliation Act,³ many facilities fail to comply. In 2016, over one in five U.S. nursing facilities received a deficiency citation for causing

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

actual harm or jeopardy to residents. *See* Charlene Harrington et al., Kaiser Family Found., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016*, 4 (Apr. 3, 2018), <https://www.kff.org/45f0273/>. Notably, this statistic has not improved over the course of the past decade. In 2006, “almost 1 in 5 nursing homes nationwide... were cited for serious deficiencies.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO07-794T, NURSING HOME REFORM: CONTINUED ATTENTION IS NEEDED TO IMPROVE QUALITY OF CARE IN SMALL BUT SIGNIFICANT SHARE OF HOMES (MAY 2, 2007), <https://www.gao.gov/assets/120/116452.pdf>. Furthermore, even after being cited by regulators, nursing facilities continue practices that harm their residents. *See, e.g.*, Ctrs. For Medicare & Medicaid Servs., U.S. Dep’t Of Health & Human Servs., *Special Focus Facilities (SFF) Initiative*, 1 (Oct. 18, 2018), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/SFFList.pdf>.

C. Arbitration Fails to Effectively Address the Continuous Culture of Abuse and Neglect in Nursing Facilities.

Litigation is a vital tool for nursing home residents and their families to hold nursing facilities accountable for abuse and neglect. *See* Charlene Harrington and Toby S. Edelman, *Failure to Meet Nurse Staffing Standards: A Litigation Case Study of a Large US Nursing Home Chain*, (July 20, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6055099/>. The right to bring a claim in a public court of law is essential to protect residents of nursing facilities.

See Alexandra D. Lahav, *Article & Essay: The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683-1690 (2016) (“At least some measure of transparency is a social good, necessary not only for individual well-being but also for the successful functioning of a democratic society. Litigation can bring to light vital information that would otherwise remain hidden[.]”).

The Center for Medicare & Medicaid Services (CMS) lists “Enhance[ing] Consumer Awareness and Assistance” as their first Principle of Action in their 2016-2017 Nursing Home Action Plan. Center for Medicare & Medicaid Services *CMS Survey and Certification Group 2016/2017 Nursing Home Action Plan: Action Plan for Further Improvement of Nursing Home Quality*, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/2016-2017-Nursing-Home-Action-Plan.pdf>. CMS observed, “[c]onsumers are essential participants in ensuring the quality of care in any health care system. The availability of relevant, timely information can significantly assist consumers with actively managing their own care.” *Id.* at iv. Arbitration of wrongful death claims ensures that access to “relevant, timely information” is extremely restricted. In light of the prevalence and severity of abuse and neglect in nursing facilities, and the inability or unwillingness of regulators to effectively enforce quality of care standards, nursing

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

CONCLUSION

For these reasons, Amici respectfully request that the district court opinion be reversed, and the matter dismissed so that Defendant-Appellant may proceed with her wrongful death action in Massachusetts state court.

Dated: November 14, 2018

Respectfully submitted,

/s/ William Alvarado Rivera

William Alvarado Rivera*

Meryl D. Grenadier

Kelly R. Bagby

AARP Foundation

601 E Street, N.W.

Washington, D.C. 20049

(202) 434-2137

* *Counsel of Record*

Counsel for Amici Curiae

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This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 1ST CIR. R. 29(a)(5), because the brief contains 4039 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7).

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/s/ William Alvarado Rivera
William Alvarado Rivera*
Meryl D. Grenadier
Kelly R. Bagby
AARP Foundation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2137
* *Counsel of Record*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Justin Lee Amos
Morrison Mahoney LLP
250 Summer St
Boston, MA 02210-1181
(617) 439-7559
jamos@morrisonmahoney.com

Joseph M. Desmond
Morrison Mahoney LLP
250 Summer St
Boston, MA 02210-1181
(617) 439-7500
jdesmond@morrisonmahoney.com

David John Hoey
Law Offices of David J. Hoey, P.C.
352 Park Street, Suite 105
North Reading, MA 01864
(978) 664-3633
DHoey@HoeyLaw.com

Daniel Thomas Landry
Law Offices of David J. Hoey, P.C.
352 Park Street, Suite 105
North Reading, MA 01864
(978) 664-3633
DLandry58@gmail.com

Dated: November 14, 2018

/s/ William Alvarado Rivera

William Alvarado Rivera*
Meryl D. Grenadier
Kelly R. Bagby
AARP Foundation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2137
* *Counsel of Record*

Counsel for Amici Curiae