IN THE COURT OF APPEALS OF MARYLAND

No. 28
September Term, 2017

STATE OF MARYLAND,

Appellant,

v.

NEISWANGER MANAGEMENT SERVICES, LLC, *et al.,*

Appellees.

On Appeal from the Circuit Court for Montgomery County
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, AARP, LONG TERM CARE COMMUNITY COALITION, MARYLAND LEGAL AID, AND NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE IN SUPPORT OF APPELLANT

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INTRODUCTION

This appeal presents an opportunity for this Court to clarify the Attorney General's role in protecting some of Maryland's most vulnerable residents from predatory practices that can leave them abandoned and traumatized. The State seeks to enforce several provisions of the Patient's Bill of Rights, Md. Code Ann., Health-General §§ 19-342 to 19-353, regulating the involuntary discharge of nursing home residents, by enjoining five nursing facilities from implementing company policies or practices that systemically violate the statute.

The trial court's narrow reading of the statute, limiting the State's authority to pursue injunctive relief only as it relates to particular individuals, is inconsistent with the text, purpose and intent of the statute, which was enacted to ensure protection for all nursing home residents, not merely those with the cognitive and physical ability to alert the State to individual violations of the law. *See Walton v. Mariner Health of Maryland, Inc.*, 391 Md. 643, 671 (2006) (stating that the statute was enacted "to safeguard nursing home residents from being involuntarily discharged from a facility due to nonpayment" and "[t]he thrust of the [statute] and the intent of the Legislature was to ensure protection for nursing home residents and their agents from unscrupulous and unethical actions by a nursing home facility"). This Court should hold that the Patient's Bill of Rights empowers the Attorney General to enforce the statute to effectively achieve its purpose and comprehensively ensure the safety of nursing home residents.

STATEMENTS OF INTEREST OF *AMICI*

The **Public Justice Center** (PJC) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the under-represented. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients. Its Appellate Advocacy Project seeks to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before the Maryland state and federal appellate courts. The PJC has participated in a number of Maryland cases protecting the rights of economically vulnerable nursing home residents. *See Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251 (2009); *Dep't of Health & Mental Hygiene v. Brown*, 406 Md. 466 (2007); *Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp.*, 369 Md. 67 (2002). The PJC has an interest in this case because of its commitment to ensuring that economically vulnerable consumers are protected from predatory violations of the Maryland law.

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 advocate 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 ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. Among other things, AARP and AARP Foundation advocate for

quality long-term care and against the predatory harmful practice of resident dumping and have participated in a number of Maryland cases protecting the rights of economically vulnerable nursing home residents. *See Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251 (2009); *Dep't of Health & Mental Hygiene v. Brown*, 406 Md. 466 (2007). AARP and AARP Foundation are interested in this case because the trial court incorrectly and dangerously limited the State's ability to carry out its statutory duty to protect nursing facility residents.

The **Long Term Care Community Coalition** (LTCCC) is a nonprofit organization dedicated to improving quality of care, quality of life and dignity for elderly and disabled people in nursing homes, assisted living and other residential settings. LTCCC focuses on systemic advocacy, researching relevant national and state policies, laws and regulations in order to identify relevant issues and develop meaningful recommendations to improve quality, efficiency and accountability. In addition to providing a foundation for advocacy, LTCCC uses this research and the resulting recommendations to educate policymakers, consumers and the general public. Consumer, family and LTC Ombudsman empowerment are fundamental to our mission. LTCCC is interested in this case because of its profound concerns for the safety and welfare of vulnerable nursing home residents, for whom the protections in the Patient's Bill of Rights are essential.

Maryland Legal Aid is the statewide provider of general civil legal services for the low-income population of Maryland. It has been in existence for over 106 years, serving Maryland from 12 offices across the state. Maryland Legal Aid's primary

practice areas include housing, public benefits, family law, consumer law, and children's advocacy, and it has a robust elder law practice which touches on all of these areas. For over 25 years, Maryland Legal Aid has maintained a long-term care project and has represented those in assisted living facilities and nursing homes faced with involuntary discharges, most often related to behavioral health or eligibility for Medicaid. In this capacity, Maryland Legal Aid's interests align with the other *amici* who are participating in this submission, and the efforts to strengthen advocacy efforts arising from the Patient's Bill of Rights will positively impact Maryland Legal Aid's work on behalf of these clients. Maryland Legal Aid has a vested interest in ensuring that the Attorney General is provided the broadest of powers to protect and advocate for low-income elderly and disabled individuals in nursing homes.

The **National Consumer Voice for Quality Long-Term Care** (Consumer Voice) is a national, nonprofit organization dedicated to advocating for public policies that support quality care and quality of life responsive to consumers' needs in all long-term care settings. Formed in 1975 due to public concern about substandard care in nursing facilities, the Consumer Voice has become the leading national voice representing consumers on national policy issues, helping to ensure that consumers are empowered to advocate for themselves. Consumer Voice's staff provide ongoing support and resources for consumers and advocates about residents' rights and nursing facility practices, including involuntary transfer and discharge. The outcome of this case will impact Consumer Voice's policy advocacy and efforts to equip and inform consumers about their rights related to discharge from a long-term care facility.

ARGUMENT

The Patient's Bill of Rights was created to provide basic rights to Maryland residents in health facilities. *See* 1974 Md. Laws, ch. 628. The statute proclaims the State's policy of "promot[ing] the interest and well-being of each resident of a facility." Health-Gen. § 19-343(b). The General Assembly intended to ensure the following rights, as well as others, for each such resident:

> (i) The right to be treated with consideration, respect, and full recognition of human dignity and individuality; (ii) The right to receive treatment, care, and services that are adequate, appropriate, and in compliance with relevant State and federal laws, rules, and regulations; . . . (iv) The right to be free from mental and physical abuse; (v) The right to expect and receive appropriate assessment, management, and treatment . . . ; (vii) The right to receive respect and privacy in a medical care program; and (viii) The right to manage personal financial affairs.

Id.

The Patient's Bill of Rights also includes provisions that specifically address involuntary discharge and transfer from nursing home facilities. *See* Health-Gen. §§ 19-345 to 19-345.3. These sections of the statute were created to prevent the harmful effects of involuntary discharge and promote quality treatment of nursing home residents. Indeed, the statute allows the State to impose civil penalties on a facility for unlawfully discharging a resident and empowers the Attorney General to seek injunctive relief for unlawful discharges or transfers. *Id.* § 19-345.3. In determining the proper scope of the Attorney General's enforcement authority, the Court should heed the statute's purpose and consider the extraordinary vulnerability of nursing home residents, the detrimental

impact of involuntary discharge, and the need for robust State enforcement and oversight to prevent the widespread incidence of improper discharges.

I. THE PATIENT'S BILL OF RIGHTS WAS CREATED TO PROTECT VULNERABLE NURSING HOME RESIDENTS.

A. The Majority of Nursing Home Residents Suffer from a Physical or Cognitive Impairment, Rendering Them Vulnerable to Abuse and Mistreatment.

Nursing home residents are some of the most vulnerable members of our society. Many residents suffer both physical and cognitive impairments. The Centers for Medicare and Medicaid Services (CMS) found that in 2014 more than eighty percent of residents had at least one impairment in an activity of daily living (ADL). Ctrs. for Medicare & Medicaid Servs., *Nursing Home Data Compendium* 185 (11th ed. 2015). An ADL includes bed mobility, dressing, eating, transferring from surfaces (such as to and from a bed, chair, or wheelchair, or to and from a standing position), and toileting. Kaiser Family Found., *Nursing Facilities, Staffing, Residents and Facility Deficiencies* 10 (Aug. 2015). Nursing home residents with ADL impairments may require a moderate level of assistance, but some residents can become dependent in a given activity at a level that requires extensive assistance from facility staff to perform the activity. *Id.* In 2014, on average, residents' level of need for assistance with ADLs scored 5.8 on a scale from 3 to 9, which has been fairly stable since 2009. *Id.* Residents frequently have mobility deficiencies, which can range from difficulty walking to an inability to get oneself out of bed. *Id.* at 2. While about four percent of residents were bed-bound in 2014,

approximately three quarters of residents required a wheelchair for mobility or were unable to walk without substantial support from others. *Id.*

Additionally, more than sixty percent of nursing home residents had moderate to severe cognitive impairments in 2014, with more than one third having a severe impairment. Ctrs. for Medicare & Medicaid Servs., *supra* at 185. One of the most common causes of cognitive impairment among nursing home residents is Alzheimer's disease and other dementias.[1] Alzheimer's Ass'n, *2017 Alzheimer's Disease Facts and Figures* 5 (2017). Alzheimer's disease is the most common type of dementia, accounting for sixty to eighty percent of dementia cases. *Id.* at 6. The number of Americans diagnosed with a form of dementia is increasing at a startling rate. Recently, the Alzheimer's Association reported that 5.4 million people aged 65 or older had Alzheimer's disease. *Id.* at 1. After receiving a diagnosis of Alzheimer's disease, the average individual will spend the majority of his or her remaining years in a nursing home. *Id.* at 30. And nearly half of nursing home residents had a dementia diagnosis in 2014. Kaiser Family Found., *supra* at 2.

Due to their cognitive and physical impairments, nursing home residents are highly susceptible to manipulation and mistreatment. With the loss of cognitive ability may come the inability to generate coherent speech, understand spoken or written language, identify objects, think abstractly, make sound judgments, or execute motor

[1] Dementia is a clinical syndrome causing loss or decline in memory and the loss of one or more cognitive abilities. Alzheimer's Ass'n, *2017 Alzheimer's Disease Facts and Figures* 5 (2017).

activities. Alzheimer's Ass'n, *supra* at 6, 9. Also, approximately 2 percent of nursing facility residents were reported to have a developmental disability, including mild to profound mental retardation. Kaiser Family Found., *supra* at 12. Those with mobility impairments are less capable of exerting control over their bodies and physical location. Residents are thus at risk of enduring various acts of abuse and neglect. "'Risk' implies *probability* of harm.... Most debilitating of all [abusive acts] are the effects of poor care and careless or deliberate physical or medical neglect. In the most severe cases, the consequences can be life threatening." Nat'l Ctr. on Elder Abuse, *Nursing Home Abuse Risk Prevention Profile & Checklist* 1 (2005).

B. Poor Quality of Care and Treatment of Nursing Home Residents Disproportionately Affects Women and Racial and Ethnic Minorities.

Nursing home residents account for a significant portion of our society. According to CMS, as of December 31, 2014, over 1.4 million Americans were living in nursing homes, corresponding to 2.6 percent of the over-65 population and 9.5 percent of the over-85 population.[2] Ctrs. for Medicare & Medicaid Servs., *supra* at 2. Specifically, in Maryland, 25,000 individuals live in nursing facilities, with 2.6 percent of residents aged 65 or older and 9 percent of residents aged 85 or over. *Id.* at 199. From 2009 to 2014, nursing home capacity has remained relatively flat and occupancy rates have declined. Kaiser Family Found., *supra* at 3. However, the overall demand for long-term

[2] The prevalence of Alzheimer's Disease and other forms of dementia also increases as people age. Alzheimer's Ass'n, *supra* at 5.

care services will likely increase in the coming years as the "baby boom" generation ages. *Id.*

Nationally and in Maryland, women constitute nearly two-thirds (65.6 percent) of the nursing home population. Ctrs. for Medicare & Medicaid Servs., *supra* at 199. Nationally, racial and ethnic minorities make up twenty-two percent of the nursing home population. *Id.* at 203. In Maryland, however, more than one third of nursing home residents are Black and Latinx—34 percent and 1.3 percent, respectively. *Id.* Also, "[r]ecent research regarding racial and ethnic minorities in nursing homes finds that between 1998 and 2008, the number of elderly [Latinx] people living in nursing homes increased by 54.9 percent, the number of elderly Asians living in nursing homes increased by 54.1 percent, and the number of elderly [Black Americans] living in nursing homes increased by 10.8 percent." Ctr. of Medicare Advocacy, *The Changing Demographics of Nursing Home Care: Greater Minority Access… Good News, Bad News*, http://www.medicareadvocacy.org/the-changing-demographics-of-nursing-home-care-greater-minority-access%E2%80%A6-good-news-bad-news (last visited Oct. 27, 2017).

Additionally, during this ten-year period, "the number of white Americans living in nursing homes declined by 10.2 percent," as they were more inclined to move into assisted living facilities. *Id.; see also* Kaiser Family Found., *supra* at 3 (noting that the decline in nursing home capacity may reflect a shift from institutional to community-based long-term care). The cause of this disparity may be financial. Researchers have "found that assisted living facilities are more often located in areas where there is higher

educational attainment, higher income, and greater housing wealth" and generally provide care to a more affluent population. Lorraine A. West et al., *65+ in the United States: 2010*, U.S. Census Bureau 51–52 (2014), https://www.census.gov/content/dam/ Census/library/publications/2014/demo/ p23-212.pdf. White Americans "may have more varied choices of care in the communities," such as home and community-based care, and "may have been better able to afford alternatives to nursing homes such as assisted living facilities." Ctr. of Medicare Advocacy, *supra*; *see also id.* ("Even though approximately 131,000 people living in assisted living use Medicaid home and community-based waivers to help pay for their stay, the vast majority of assisted living residents, 869,000, pay privately.").

Conversely, nursing facilities serving predominately minority residents tend to be located in poor communities and are generally associated with low staffing and poor quality of care. *See* Vincent Mor et al., *Driven to Tiers: Socioeconomic and Racial Disparities in the Quality of Nursing Home Care*, The Milbank Q. (2004), https://www.ncbi.nlm.nih. gov/pmc/articles/PMC2690171/. For instance, majority-Black and Latinx facilities on average have larger patient populations than the majority-white nursing homes, which reflects in part the limited options Black and Latino Americans have in their neighborhoods compared with white Americans. Jeff Kelly Lowenstein, Nursing Homes Serving Minorities Offering Less Care Than Those Housing Whites, Center for Pub. Integrity (Nov. 17, 2014), https://www.publicintegrity.org/2014/11/17/ 16275/ nursing-homes-serving-minorities-offering-less-care-those-housing-whites. "Nursing homes are even more segregated than cities, and cities are very segregated. The

best predictor of which nursing home somebody will choose is proximity to their zip code of origin." *Id.* (quoting Mor). As white Americans are more inclined to move into assisted living facilities and racial and ethnic minorities are increasingly moving into nursing facilities, minorities are at an increased risk of maltreatment. *Id.*

The Patient's Bill of Rights seeks to promote and enforce the basic rights of all nursing home residents, a group that has historically been abused and mistreated as detailed in the State's brief. *See* Appellant's Br. 13–16; *see also* Health-Gen. § 19-343(b). Though the Court should seek to address the needs of all residents, it should also be mindful of the increased vulnerability of disadvantaged nursing home residents as the demographics of the nursing home population change. Promoting the Attorney General's broad enforcement of the statute would ensure equal justice for and protection of vulnerable residents further marginalized by their gender, race, and socioeconomic status.

II. THE PATIENT'S BILL OF RIGHTS WAS CREATED IN PART TO PREVENT THE DETRIMENTAL AND TRAUMATIC EFFECTS OF INVOLUNTARY DISCHARGES AND TRANSFERS ON NURSING HOME RESIDENTS.

In this case, the State is seeking to protect its most vulnerable residents by addressing the most commonly reported complaint among those living in nursing facilities—improper involuntary discharge or transfer. Ina Jaffe, *As Nursing Homes Evict Patients, States Question Motives*, NPR WNYC Radio (May 26, 2017), http://www.npr.org/sections/ health-shots/2017/05/26/529915765/states-try-to-keep-nursing-homes-from-kicking-out-less-lucrative-patients. "Discharge is the movement from a certified institutional setting to a non-institutional setting," whereas "transfer"

refers to "movement from a certified institution to another institutional setting that assumes legal responsibility for the resident's care." The Nat'l Consumer Voice for Quality Long-Term Care, *Involuntary Transfer and Discharge* 1 (2017). The threat of either "can be both frightening and stressful for residents and their families." *Id.*

Involuntary discharge or transfer from a facility can create severe physical and emotional problems for residents. "Many nursing home residents, especially those who are incompetent or disoriented, develop a physical, psychological and emotional dependence upon their surroundings" usually within six months of admission, and "the reliance is so complete that any move . . . can cause serious emotional and psychological damage, [and] physical stress." Erias A. Hyman, *The Nursing Home and Community Residence Facility Residents' Protections Act of 1985 -- Boon Or Bane?*, 32 How. L.J. 39, 40 (1989). Some studies suggest that nursing home residents may also experience a decline in health, and even hastened death, as a result of involuntary transfer or discharge. Renee Carlson, *Case Note and Comment: Protecting the Nursing Home Industry & the Elderly Following the Deficit Reduction Act of 2005*, 82 Temp. L. Rev. 1303, 1311 (2010) (collecting citations). One study found that the death rate for transferred residents is more than three times higher than would otherwise be expected for the first three months following transfer.[3] Terri D. Keville, *Studies of Transfer*

[3] There is, however, no definitive research establishing the existence of "transfer trauma," which is "a phenomenon associated with the involuntary relocation of institutionalized chronically ill elderly from one facility to another." Elias S. Cohen, *Legislative and Educational Alternatives to a Judicial Remedy for the Transfer Trauma Dilemma*, 11 Am. J. L. & Med. 405, 406 (1986). This is because various studies use differing research methods and lead to conflicting results. *Id.* at 412–14.

Trauma in Nursing Home Patients: How the Legal System Has Failed to See the Whole Picture, 3 Health Matrix 421, 424 (1993).

Studies have also shown several factors contributing to the traumatic effects involuntary discharges and transfers may have on nursing home residents. *Id.* at 424–26. Discharge breaks the social groups created and maintained by the residents within the nursing facilities, upon which they rely for cognitive and emotional support. Carlson, *supra* at 1312. For residents whose families do not visit, these relationships are especially important. *Id.*; *see* J.E. Gaugler, *Family Involvement in Residential Long-Term Care: A Synthesis and Critical Review*, 9 Aging & Mental Health 105 (2003), https://www.ncbi. nlm.nih.gov/pmc/ articles/PMC2247412 . Involuntary transfer without offering the required counseling and planning can lead to "isolation and despair" and increased rates of morbidity and mortality. Carlson, *supra* at 1312. Involuntary transfers that do not provide the resident with predictability maximize fear and anxiety. *Id.*; *see also* Debra Street et al., *The Salience of Social Relationships for Resident Well-Being in Assisted Living*, 62:2 J. of Gerontology Series B: Psychol. Sci. & Soc. Sci. S129, S130 (2007) ("Research has shown that relocation is among the most stressful life events for older adults . . . . Forced relocation is particularly stressful, whereas voluntary moves [especially when the older adult participates in the decision to move] are less likely to cause negative outcomes."). Predictability is increased when the facility takes the required steps to familiarize the resident with the new location, provide notification and

counseling, and otherwise alleviate the resident's fear. Carlson, *supra* at 1312. A resident's impaired cognitive function, psychosis, depression, and anger or a reaction to discharge that exhibits denial, anger, anxiety, regression, or depression tend to presage increased morbidity. *Id.* Failing to facilitate "[e]motional adjustment before and after being informed of the impending transfer may play a role in post-transfer mortality." *Id.*; *see also* Keville, *supra* at 424; Mary Ann Lewis, *The Immediate and Subsequent Outcomes of Nursing Home Care*, 75:7 American J. of Pub. Health 758 (1985).

The mere threat of transfer or discharge from a nursing home can be both frightening and stressful for residents and their families. In cases where the residents and/or their family members successfully appeal an involuntary discharge decision, the resident is still left uneasy, even months later. Matt Sedensky, *Nursing Homes Turn to Eviction to Drop Difficult Patients*, Associated Press (May 8, 2016), https://apnews.com/95c33403b5024b4380836d3ed3dfecb0. "It can be traumatic to move a person from one room to another in the same facility, never mind a whole new place. The most common reaction is a sense of panic." *Id.* (quoting Richard Danford of the Center for Independence of the Disabled, Director of the New York City Long Term Care Ombudsman Program). Without meaningful and effective enforcement of laws created to prevent such trauma, like the Patient's Bill of Rights, nursing home residents will continually endure unnecessary emotional and physical stress and increased susceptibility to negative health effects.

III. THE PREVALENCE OF IMPROPER INVOLUNTARY DISCHARGE AND TRANSFER COMPLAINTS AMONG NURSING HOME RESIDENTS HIGHLIGHTS THE NEED FOR ROBUST STATE ENFORCEMENT OF THE PATIENT'S BILL OF RIGHTS.

As detailed in the State's brief, the General Assembly enacted the provisions of the Patient's Bill of Rights related to involuntary discharge in 1995 after learning about Anna Mae Washington, an 83-year-old Maryland resident who was discharged from a nursing facility for non-payment and left on the porch of her lawyer in Washington, DC. Appellant's Br. 15–16. But despite the enactment of legislation to protect Maryland residents like Ms. Washington, nursing facilities have continued to engage in similar behavior over the past two decades.

A. Despite State and Federal Law Regulating Involuntary Discharges, the Number of Complaints Continues to Grow.

Federal and Maryland laws prohibit nursing homes from involuntarily transferring or discharging a resident without establishing that a permissible reason for transfer or discharge exists. 42 C.F.R. § 483.15(c)(1); Health-Gen. § 19-345(a). The reason asserted in this case is that the resident has failed, after reasonable and appropriate notice, to pay for care. Health-Gen § 19-345(a)(4). The facility, however, is prohibited from evicting a resident who is waiting for a determination of Medicaid eligibility and must work with other state agencies to obtain payment if the resident's money is being held by a family member or other individual. *Id.* § 19-345(b). Conversion from a private-pay rate to a Medicaid rate does not constitute nonpayment for purposes of discharge, and nonpayment has not occurred as long as the resident has submitted all paperwork to a third party

(including the Medicaid agency) in order to secure payment for the nursing home bill. 42 C.F.R. § 483.12(a)(2); Health-Gen. § 19-345(b).

Maryland law requires nursing homes to ensure that resident discharges or transfers are safe and as peaceful as possible. *See* Health-Gen. § 19-345.2 (requiring the nursing facility to provide comprehensive discharge planning and assistance to the resident). The facility must attempt to alleviate the stress of relocation on the resident by providing discharge planning and sufficient preparation and orientation. *Id.* This orientation should include some form of counseling, such as visiting the new home, telling the resident where he or she is going, and assuring a safe arrival. The Nat'l Consumer Voice for Quality Long-Term Care, *supra* at 1–2.

Despite these requirements, the number of formal complaints detailing improper nursing home discharge practices has grown in recent years. William Pipal, Note: *You Don't Have to Go Home but You Can't Stay Here: The Current State of Federal Nursing Home Involuntary Discharge Laws*, 20 Elder L.J. 235 (2012). Indeed, complaints about nursing home discharge practices doubled between 1996 and 2006. Carlson, *supra* at 1311. As of 2015, eviction or involuntary discharge has been the top complaint against nursing facilities, amounting to about 9,000 complaints that year. Jaffe, *supra*. An Associated Press analysis of federal data from the Long-Term Care Ombudsman Program found that, though the numbers of both nursing homes and residents in the U.S. have decreased in recent years, and the overall number of nursing home complaints has fallen during the past decade, complaints about discharge are down only slightly from their

highest point in 2007, thus representing a steadily growing portion of complaints and holding the top position since 2010. Sedensky, *supra*.

B. Many Unlawful Involuntary Discharges are Financially Motivated and Disparately Impact Women, Racial Minorities, and the Poor.

Medicaid recipients are prime targets for involuntary discharge in favor of private payors and Medicare beneficiaries. Theo Francis, *To Be Old, Frail and Evicted: Patients at Risk*, Wall St. J., Aug. 7, 2008, http://online.wsj.com/article/SB121806702698918693.html. The majority of nursing home residents are Medicaid beneficiaries. Kaiser Family Found., *supra* at 1. In Maryland specifically, Medicaid residents make up about 61 percent of all nursing home residents. Kaiser's Family Found., *Medicaid's Role in Nursing Home Care* (June 20, 2017), https://www.kff.org/infographic/medicaids-role-in-nursing-home-care . Medicare covers only limited post-acute care, and very few nursing home residents can afford private coverage. Thus, Medicaid is the primary payer source for most certified nursing facility residents nationwide, with more than six in ten residents (sixty-three percent) having Medicaid as their primary payer in 2014. *Id.*; H. Stephen Kaye et al., *Long-Term Care: Who Gets It, Who Pays Provides It, Who Pays, And How Much,* 29:1 Health Affairs 16 (2010).

Those aged 85 years and older, women, and Black Americans are more likely to rely on Medicaid as their primary source of payment. *See* Tara Culp-Ressler, *Study: Elderly Black Americans Receive Worse Nursing Home Care than White Americans,* ThinkProgress (Sept. 3, 2013),https://thinkprogress.org/study-elderly-black-americans-receive-worse-nursing-home-care-than-white-americans-12612b8e5227; Jose Ness et al.,

Demographics & Payment Characteristics of Nursing Home Residents in the United States: A 23-Year Trend, 59A J. of Gerontology 1213, 1216 (2004). Black women particularly have demonstrated a consistent trend toward increased nursing home residence. Ness, *supra* at 1216. Women generally are more likely to be widowed and live alone, and Black women are more likely to live below the poverty line, with poverty rates higher among women than among men aged 65 or older—in 1999, thirteen percent and seven percent, respectively—and higher among minorities compared with white persons. *Id.*

Many nursing facilities rely on Medicaid reimbursements to remain in operation, thereby targeting the Medicaid market to ensure a stable population of residents. *Medicaid's Role in Nursing Home Care* at 2. However, Medicaid reimbursement rates are substantially lower than Medicare rates. Charlene Harrington et al., *Nursing Staffing Levels and Medicaid Reimbursement Rates in Nursing Facilities*, 42:3 Health Research & Educ. Trust 1105, 1106 (2007). These lower rates can result in low staffing and poor quality of care. *Id.* at 1107. Other nursing facilities may strategically provide higher levels of staffing or more registered nurses, despite the increased operation costs, to compete for Medicare recipients, with their higher reimbursement rates, and the private pay market. *Id.* at 1106. "Rather than admit a long-term Medicaid patient, many facilities would prefer to fill a bed with a private-pay resident or a short-term rehabilitation patient, whose care typically brings a far higher reimbursement rate under Medicare." Sedensky, *supra*. "Due to this discrepancy, residents paying via Medicaid make an attractive target for nursing homes to unlawfully discharge." Eric Carlson,

Twenty Common Nursing Home Problems and the Laws to Resolve Them, 39 J. Poverty L. & Pol'y 520, 532 (2010). Though discharging a resident because of his or her method of payment is illegal, nursing homes continue to do so in the absence of meaningful oversight, as they seek to benefit from the dramatic difference in compensation between what Medicaid-sponsored residents and private pay residents pay nursing homes for providing long-term care. Pipal, *supra* at 252.

C. Many Nursing Home Residents are Unable to Challenge Their Unlawful Involuntary Discharge and, Therefore, Need the State to Prevent Wrongdoing.

Nursing home residents have a right to appeal the facility's decision to transfer or discharge them. The Nat'l Consumer Voice for Quality Long-Term Care, *supra* at 2. They may also file complaints with the state survey agency. *Id.* Although a few residents or their families are able to file a complaint in cases of unlawful eviction, experts assert that many more improper evictions of nursing home residents go unchallenged. Pipal, *supra* at 238; Francis, *supra*. Given the physical and cognitive infirmities of most nursing home residents, it is unlikely that each will be able to appeal the facilities' decisions to involuntarily discharge them, much less file a complaint with the state. As nearly half of the nursing home resident population has some form of dementia, which may limit residents' ability to speak, understand spoken or written language, think abstractly, make sound judgments, or execute motor activities, the likelihood that each individual resident will be able to report an unlawful involuntary discharge is greatly diminished. The same can be said of those residents suffering from developmental disabilities. Additionally, the resident's family members may be equally

unaware or ill-equipped to assess the resident's rights and appeal the discharge or file a complaint. And many nursing home residents have no family to rely on in such a manner. Gaugler, *supra* at 105. Thus, the State must be permitted to assert these residents' rights collectively under the law when they are incapable of doing so themselves. With evidence of widespread violations of vulnerable residents' rights, the State should be able to seek concomitant widespread enforcement of their rights to protect these residents whose various vulnerabilities prevent them from lodging individual complaints on their own.

CONCLUSION

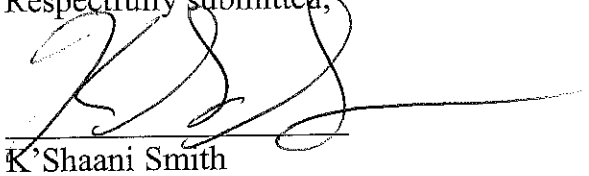
Despite clear law regulating involuntary discharge, nursing homes continue to violate the rights of their residents, which oftentimes leads to detrimental health-related repercussions. Full and rigorous enforcement of these laws is essential to the safety and protection of nursing home residents who are extraordinarily vulnerable to abuse and mistreatment by the facilities. The growing elderly population and increased incidence of dementia further underscores the need for effective enforcement to protect these residents.

The State has been empowered to engage in just such enforcement through the Patient's Bill of Rights. *See* Health-Gen. § 19-345.3. Government enforcement was purposefully included in the statute to ensure that all residents were protected from the abuses that prompted the substantial reform of the long-term care industry. *Id.* As many nursing home residents are unable to assert their rights on an individual basis, the State must be able to exercise its police power to ensure uniform compliance with the law as to

all affected residents; not just those few who have the wherewithal to file an individual complaint.

Accordingly, *amici curiae* respectfully request that the Court reverse the trial court's narrow reading of the statute and permit the State to seek an appropriate injunction of NMS's company-wide practices that systemically violate the Patient's Bill of Rights.

Respectfully submitted,



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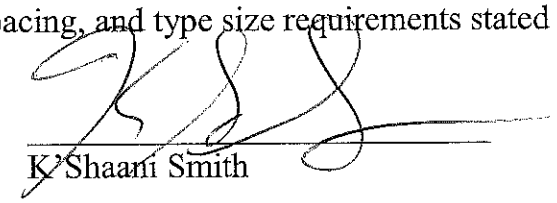

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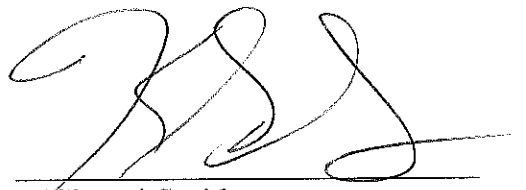

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