

July 31, 2020

The Honorable Mitch McConnell
Senate Majority Leader
United States Senate
Washington D.C. 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

The Honorable Charles Schumer
Minority Leader
United States Senate
Washington D.C. 20510

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, DC 20515

Dear Majority Leader McConnell, Speaker Pelosi, and Minority Leaders Schumer and McCarthy:

As advocates for our country's 1.3 million nursing home residents, we write to strongly oppose the provisions in the Safe to Work Act ("S.4317") that allow nursing homes to escape accountability for negligent care that harms or results in the death of nursing home residents during the COVID-19 pandemic. We also oppose any provisions that would make it easier for nursing homes nursing homes to discriminate, under the guise of COVID-19 prevention, against residents or workers based on race, disability, sex, or national origin.

S.4317 grants blanket immunity to nursing homes from liability for all negligent care that harms residents for the next five years. In doing so, it endorses the provision of care to nursing home residents that departs from established standards and allows nursing homes to provide that care without fear of repercussion. S.4317 is harmful and unnecessary. It will imperil nursing home residents and further perpetuate the horrific effects the crisis is having on residents and families across the country.

The devastation in nursing homes could have been prevented. Over 59,000 residents of long-term care facilities have died from COVID-19 since the pandemic began.¹ It is increasingly becoming clear that nursing homes that experienced high infection rates and deaths from COVID-19 were facilities with histories of inadequate infection procedures, low staffing, and a higher number of violations. The Centers for Medicare & Medicaid Services has stated that there is a connection between poor quality homes and COVID-19 outbreaks² and research supports this conclusion. A report released by the General Accountability Office in May detailed how, prior to the pandemic, 82% of facilities in the United States had been cited for infection control violations, with over half of those having persistent problems.³ In addition, two recent studies show that facilities with histories of inadequate staffing and poor quality ratings experienced higher numbers of COVID-19 infections in their facilities.⁴

¹ https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/?utm_source=web&utm_medium=trending&utm_campaign=covid-19

² <https://www.cms.gov/newsroom/press-releases/trump-administration-unveils-enhanced-enforcement-actions-based-nursing-home-covid-19-data-and>

³ <https://www.gao.gov/products/GAO-20-576R>

⁴ Harrington, C, Chapman, S., Spurlock, B, Bakerkjian, D., 2020, *Nurse Staffing and Coronavirus Infections in California Homes*, Policy, Politics & Nursing Practice; Li, Y., Temkin-Greener, H., Gao, S., Cai, X., 2020, *Covid0-19 Infections and Deaths Among Connecticut Nursing Home Residents*.

A few examples illustrate the catastrophic impact poor-quality care has had upon nursing home residents during the pandemic:

- The Brighton Rehabilitation and Medical Center in Beaver County, Pennsylvania had over eighty residents die from COVID-19. When state and federal inspectors visited Brighton in April and May, they discovered egregious infection control deficiencies, including staff not washing their hands or using PPE properly, staff failing to properly sanitize medical equipment, and staff providing care without using masks. The facility was cited for failing to conduct proper infection control training of practically all its staff.⁵
- The Life Care Center of Kirkland, Washington became the center of the state's coronavirus outbreak, with 35 patients eventually dying. The facility held a Mardi Gras party in late February, even though staff had noticed respiratory illnesses in residents weeks earlier. Two residents died that same day.⁶ The Centers for Medicare and Medicaid Services subsequently fined the nursing home for failing to report an outbreak of respiratory illness in a timely way; providing inadequate care; and failing to provide 24-hour emergency doctor services.⁷
- New Jersey police found 18 bodies stacked up in a "makeshift" facility at a New Jersey nursing home.⁸ The nursing home had a history of complaints and citations, receiving a one-star rating from CMS. The NJ Attorney General is investigating.⁹ On April 17, 2020, the owner of the home stated, "It's under control." At that time 35 residents had died. Since the owner's statement, 29 more residents have died from COVID-19.¹⁰
- At least 51 residents died, and 25 health care providers tested positive in a Richmond, Virginia nursing home.¹¹ Before the outbreak, the latest CMS inspection gave the facility two stars, citing "serious staffing shortages," "high rates of bed sores," and "nearly twice as many health deficiencies as the average Virginia nursing home."¹²

Under the Safe to Work Act, the families of the residents who died in these and other facilities will not be able to seek redress for their loved ones. The law would result in residents paying with their lives for the failures of nursing homes to provide appropriate care, while allowing the facilities to escape accountability.

Residents who have not yet suffered harm will also be victims of S.4317. Currently, liability for negligent care deters nursing homes from poor behavior and practices. Nursing homes know that when the care they provide departs from reasonable standards and results in the harm or death of a resident, they might be held liable in court. The Safe to Work Act removes this incentive. S.4317 tells nursing homes they need not be worried about being held liable for providing the type of care described above that killed hundreds of residents. And most importantly, it tells nursing home residents -- the Americans most

⁵ <https://www.post-gazette.com/local/west/2020/06/21/Inspection-at-Beaver-County-nursing-home-found-residents-were-in-Immediate-Jeopardy/stories/202006180171>

⁶ <https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html>

⁷ https://www.washingtonpost.com/investigations/wash-nursing-home-faces-611000-fine-over-lapses-during-fatal-coronavirus-outbreak/2020/04/02/757cee76-7498-11ea-87da-77a8136c1a6d_story.html

⁸ <https://www.usatoday.com/story/news/nation/2020/04/17/coronavirus-new-jersey-nursing-home-35-deaths-103-covid-19-cases/5148016002/>

⁹ As the New York Times article points out, this particular home was owned by a Chicago based investor who purchased this home and now leases it to the operator for eight million dollars per year.

¹⁰ https://www.state.nj.us/health/healthfacilities/documents/LTC_Facilities_Outbreaks_List.pdf

¹¹ <https://www.msnbc.com/hallie-%20jackson/watch/richmond-nursing-home-at-center-of-virginia-coronavirus-%20outbreak-81836613614>; https://www.princetwilliamtimes.com/news/virginia-still-allows-hospitals-to-transfer-patients-to-nursing-homes-without-covid-19-testing-despite/article_77250c94-c057-11ea-927c-ab7215e51c73.html

¹² https://www.richmond.com/special-report/coronavirus/we-were-simply-ripe-for-a-spread-like-this-inside-the-COVID-19-spread-at/article_2b265624-7fb6-5fe4-b080-9becb003fbd.html

harmed by this pandemic -- that they are not entitled to high quality care.

S.4317 does not just excuse negligent care that results in harm to residents from COVID-19. Almost all harm that may befall a resident, be it malnutrition, failure to provide necessary medicines, or potentially even abuse will be excused under S.4317. Making matters even worse, S.4317 proposes to extend immunity for the next five years, meaning that current and future nursing home residents must reside in facilities that can disregard safety and health standards with impunity until 2024.

S.4317 will have other serious consequences:

- 1) **Perpetuate Racial Disparities:** A recent New York Times article found that nursing homes with a significant portion of minority residents, regardless of their geographic location, were two times more likely to be hit by COVID-19 than nursing homes made up mostly of white residents.¹³ Consequently, it is people of color who are being disproportionately harmed in long-term care facilities by COVID-19, and it will likely be people of color who will be most impacted by the decline in quality of care brought about by the Safe to Work Act.
- 2) **Weaken anti-discrimination protections based on race, disability, sex, or national origin:** S.4317 weakens anti-discrimination protections for residents and nursing home workers, if the facility can demonstrate the discrimination is the result of its COVID-19 response.
- 3) **Place workers at greater risk of harm:** S.4317 disingenuously capitalizes on the deaths of hundreds of nursing home workers by claiming it protects workers. This assertion is false. Workers are rarely, if ever, sued by a resident. Rather, when facilities fail to observe laws, regulations, and standards of care workers are placed at greater risk of harm. S.4317 also significantly limits protections for employees under the Occupational Safety and Health Act, the Fair Labor Standards Act, the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, Title VII of the Civil Rights Act, Title II of the Genetic Information Nondiscrimination Act, and the Americans with Disabilities Act. Immunity makes workers less safe and that is why groups who represent workers oppose immunity.

Importantly, nursing homes already have sufficient protections from lawsuits. Nursing homes that made good faith efforts to comply with standard practices and to obtain necessary equipment, but were unable to do so due to shortages, will avoid liability because they acted reasonably. Consequently, the Safe to Work Act is not about protecting nursing homes who fell victim to supply shortages due to the pandemic, but about protecting homes that provided poor quality care during the crisis that harmed or killed nursing home residents.

Legal liability has always functioned as a safeguard for nursing home residents by incentivizing nursing homes to provide quality care and comply with laws and regulations. It has served as a silent overseer of nursing homes who know that individuals in this country will not stand for neglect and inadequate care. Due to lockdowns, this oversight is even more important, as residents are deprived of the protection of their families, nursing home ombudsmen, protection and advocacy agencies, and nursing home regulators. Judicial recourse is one of the last remaining protections for residents. S.4317 removes this safety net and places nursing home residents in jeopardy at a time when they are the Americans suffering most from the COVID-19 outbreaks. As a nation, we cannot tolerate rewarding nursing homes for years of cost cutting and profit maximizing by relieving them of responsibility.

¹³ <https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html>

We urge you to reject immunity, and instead send a message that our country will not tolerate negligent care of our parents, grandparents, friends, and neighbors. They deserve better.

Sincerely,

California Advocates for Nursing Home Reform
The Center for At-Risk Elders
Center for Independence of the Disabled
Center for Medicare Advocacy
Center for Public Representation
Justice in Aging
Law Firm of D.F. Truhowsky
The Long Term Care Community Coalition
National Association of Local Long-Term Care Ombudsman
National Academy of Elder Law Attorneys
National Association of State Long-Term Care Ombudsman Programs
The National Consumer Voice for Quality Long-Term Care
National Disability Rights Network
New York Association on Independent Living
Rivera & Shackleford, P.C.
Service Employees International Union

Cc: Members of the United States Congress