

# Congress of the United States

Washington, DC 20515

October 3, 2017

The Honorable Seema Verma  
Administrator Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Ave., S.W. Washington, DC 20201

Dear Administrator Verma:

We write to strongly urge you to maintain current protections for nursing home residents against the use of binding, pre-dispute, mandatory (“forced”) arbitration clauses in resident admission agreements.<sup>1</sup> Some of the most vulnerable members of society live in long-term care facilities. Your agency, the Centers for Medicare & Medicaid Services (CMS), concluded that forced arbitration endangers the health and safety of these residents.<sup>2</sup> The horrific reports of abuse at facilities in Florida and Texas in the wake of Hurricanes Irma and Harvey underscore the need for your agency to reconsider upending the legal protections of those who have worked and saved for their entire lives to retire with dignity. This is a time when we should be protecting our nation’s seniors, not rolling back their fundamental right to hold wrongdoers accountable for neglect and abuse.

Tragically, twelve people have died as a result of unsafe conditions in a nursing home that lost air conditioning during Hurricane Irma.<sup>3</sup> According to one of the residents, it “felt like 110 degrees” inside the facility,<sup>4</sup> which has had a history of safety violations.<sup>5</sup> More than 100

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<sup>1</sup> CMS Reform of Requirements for Long-Term Care Facilities, 42 C.F.R. § 405 *et seq.* (2016), <https://www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities>.

<sup>2</sup> *Id.* at 405.

<sup>3</sup> Arek Sarkissian, *11th resident of South Florida nursing home dies*, USA TODAY (Sept. 23, 2017), <https://www.usatoday.com/story/news/nation-now/2017/09/23/11-th-resident-south-florida-nursing-home-dies/695944001/>; Freida Frisaro, *12th Person Dies After Being Taken From Overheated Florida Nursing Home*, TIME (Sept. 29, 2017), <http://time.com/4962653/florida-nursing-home-deaths-hurricane-irma/>.

<sup>4</sup> Neil Reisner, Sheri Fink, & Vivian Yee, *Eight Dead From Sweltering Nursing Home as Florida Struggles After Irma*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/us/nursing-home-deaths-florida.html?mcubz=0>.

<sup>5</sup> Carol Marbin Mill et al., *Nursing home where 8 died in sweltering heat had poor record with state regulators*, MIAMI HERALD (Sept. 13, 2017), <http://www.miamiherald.com/news/weather/hurricane/article173059891.html>.

people were hospitalized for “dehydration, heat exhaustion and severe respiratory conditions.”<sup>6</sup> In response, Florida Governor Rick Scott has issued an emergency rule requiring “comfortable temperatures” in nursing homes following a power outage, stating that the facility will be held “accountable to the fullest extent of the law.”<sup>7</sup> It is unclear, however, whether the 160 additional nursing homes that experienced power disruptions will comply with this rule, which has a 60 day grace period.<sup>8</sup> According to one nursing home operator, it will be “impossible” for many facilities to implement this requirement,<sup>9</sup> increasing the risk of further tragedy.

Similar reports of abuse and neglect in Texas nursing homes have surfaced in the wake of Hurricane Harvey. In Port Arthur, Texas, 74 elderly Americans were stranded in floodwaters last month because a nursing home refused to evacuate its residents. A family member of a nursing home resident found her 77-year old mother, who suffers from dementia and other chronic health conditions “sitting in a wheelchair submerged in water.”<sup>10</sup> She reported that when she arrived at the facility, she had “to wade through chest-deep waters to get inside.”<sup>11</sup> Inside the nursing home, she found “mattresses piled on mattresses with people laying on the mattresses with their hands hanging in the water with wheelchairs around.”<sup>12</sup> An employee at the nursing home reportedly raised concerns that the facility should have been evacuated because it was unable to provide care for residents without necessary food and medication.<sup>13</sup> But according to local law enforcement, however, the facility refused to evacuate its residents and even resisted attempts to complete an evacuation by police.<sup>14</sup>

These disturbing accounts highlight the critical need to protect nursing home residents against abuse and hold unscrupulous facilities and caregivers accountable. Nevertheless, the ubiquitous use of forced arbitration clauses in nursing home contracts makes accountability and oversight of abuse in nursing homes virtually impossible.<sup>15</sup> These clauses are buried in the fine

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<sup>6</sup> Bill Chappell, *Florida Nursing Home Case: Many Questions, And Few Answers, After 8 Patients Die*, NPR (Sept. 14, 2017), <http://www.npr.org/sections/thetwo-way/2017/09/14/550996932/8-die-at-florida-nursing-home-after-irma-leaving-a-host-of-questions>.

<sup>7</sup> Sheri Fink & Matt Stevens, *Nursing Home Deaths Prompt New Rules by Florida Governor*, N.Y. TIMES (Sept. 16, 2017), <https://nyti.ms/2jz1013>.

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

<sup>9</sup> *Id.*

<sup>10</sup> Jacque Masse, *Restraining order: Families take legal action against Port Arthur nursing home*, KHOU (Sept. 12, 2017), <http://www.khou.com/weather/harvey/family-members-take-legal-action-against-port-arthur-nursing-home/473939914>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> CBS NEWS, *Police raid Texas nursing home where dramatic Harvey rescue took place* (Sept. 14, 2017), <https://www.cbsnews.com/news/police-raid-texas-nursing-home-dramatic-harvey-rescue/>.

<sup>14</sup> Ezzy Castro, *Investigation underway related to evacuation of flooded Port Arthur nursing home during Harvey*, KHOU (Sept. 15, 2017), <http://www.khou.com/weather/harvey/-investigation-underway-related-to-evacuation-of-flooded-port-arthur-nursing-home-during-harvey/475098844>.

<sup>15</sup> S. REP. NO. 110-518, at 2 (2008), <https://www.congress.gov/110/crpt/srpt518/CRPT-110srpt518.pdf>.

print of voluminous nursing home admission contracts and typically only accepted because they are unnoticed.<sup>16</sup> In many cases, residents or family members discover that they have signed away their rights “only after a nursing facility's negligence has caused a resident severe injury or death.”<sup>17</sup> This occurs because nursing home agreements “are often made when the would-be resident is physically and possibly mentally impaired, and is encountering such a facility for the first time,” as CMS has reported.<sup>18</sup>

Accordingly, we are deeply concerned that the presence of forced arbitration clauses in nursing home contracts threatens the health and safety of nursing home residents. Forced arbitration proceedings are confidential, do not require a record or report of proceedings, and the decisions of arbiters are often not subject to appeal.<sup>19</sup> These secretive proceedings also impede investigators' ability to prevent and address abuse in nursing homes because the sweeping confidentiality of forced arbitration clauses prohibit anyone, including surveyors and representatives of the Office of the State Long-Term Care Ombudsman, from discussing incidents involving the health and safety of residents. In recognition of this concern, CMS has warned that “the increasing prevalence of these agreements could be detrimental to residents' health and safety and may create barriers for surveyors and other responsible parties to obtain information related to serious quality of care issues.”<sup>20</sup>

This lack of transparency, oversight, and accountability facilitates abuse and neglect in nursing homes.<sup>21</sup> By foreclosing access to judicial review, forced arbitration clauses embolden unscrupulous facilities to break the law because they believe they are “immune to any legal consequences” and are able to use arbitration to “escape accountability for neglect and abuse.”<sup>22</sup> Following a careful study of this issue, CMS concluded that this secrecy is “a substantial concern,” stating:

We are also concerned that the arbitration process, especially the secrecy it involves, could result in some facilities evading responsibility for substandard care . . . When any dispute involves any allegations that relate to our long-term

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<sup>16</sup> *Id.* at 3.

<sup>17</sup> Kelly Bagby & Samantha Souza, *Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. CONTEMP. HEALTH L. & POL'Y 183 (2013).

<sup>18</sup> CMS Reform of Requirements for Long-Term Care Facilities, *supra* note 1, at 402.

<sup>19</sup> Jessica Silver-Greenberg and Robert Gebeloff, In Arbitration, a 'Privatization of the Justice System', N.Y. Times (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>20</sup> Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42,168 (proposed July 16, 2015) (to be codified at 42 C.F.R. Parts 405, 431, 447, 482, 483, 485, and 488), <https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17207.pdf>.

<sup>21</sup> Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 159 (2009).

<sup>22</sup> <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-23503.pdf> 406 (“We believe we have ample basis between the published research and the statements of commenters to support the connection between the use of pre-dispute arbitration clauses and the health and safety of LTC facility residents.”).

care requirements, especially the health care provided by the facility or instances of abuse or neglect, we believe it is necessary for the protection of the health and safety of residents that federal, state, and local health and regulatory officials have access to the relevant information and be able to conduct an investigation as appropriate. Anything that could interfere with federal, state, or local health and regulatory officials or LTC advocates from learning of, or restricting the investigation of, instances of substandard care or other serious instances affects the health and safety of residents.<sup>23</sup>

Americans in nursing homes deserve better. It is vital that residents and their families are able to enforce their rights and hold nursing home operators accountable for dangerous facility conditions and the inhumane treatment of residents. We strongly urge CMS to protect the health and safety of nursing home residents, particularly in light of recent events, by maintaining the current prohibition of forced arbitration clauses in nursing home admission contracts.

Sincerely,

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<sup>23</sup> CMS Reform of Requirements for Long-Term Care Facilities, *supra* note 1, at 421-22.

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