

Opening the Floodgates: Repealing Certificate of Needs Laws Could Drown Nursing Home Care

BRENDAN WILLIAMS*

At a time of record-low nursing home occupancy,¹ the Trump Administration has arrived at a solution: more nursing home beds.² According to the Administration: “State policies that restrict entry into provider markets can stifle innovative and more cost-effective ways to provide care while limiting choice and competition.”³ A 2018 federal report explains that “[s]tate ‘certificate of need’ (‘CON’) laws require healthcare providers to obtain permission from a state (or state-authorized) agency to construct new healthcare facilities, expand existing ones, or offer certain healthcare services.”⁴ It urges states to “consider repeal of Certificate of Need (CON) statutes or, at a minimum, significantly scale back the scope of their CON regimes, for example by ensuring that competitors of CON applicants cannot weigh in on these applications.”⁵

This would be a *very* significant change to health care regulation. According to one source, “38 states and the District of Columbia have some type of CON law[.]”⁶ These laws tend to speak to cost. For example, in North Carolina the legislature has declared,

[t]hat the financing of health care, particularly the reimbursement of health services rendered by health service facilities, limits the effect of free market competition and government regulation is

*Attorney Brendan Williams is the president/CEO of the New Hampshire Health Care Association and prolific writer on health care and civil rights issues.

1. Alex Spanko, *Skilled Nursing Occupancy Falls to New Low in Second Quarter*, SKILLED NURSING NEWS (Sept. 12, 2018), <https://skillednursingnews.com/2018/09/skilled-nursing-occupancy-reaches-new-low-second-quarter/> (“Skilled nursing facilities were 81.7% full during the quarter, according to the most recent set of data from the National Investment Center for Seniors Housing & Care[.]”).

2. Press Release, U.S. Dep’t of the Treasury, Report to President Trump on Reforming America’s Healthcare System Through Choice and Competition (Dec. 3, 2018).

3. *Id.*

4. REFORMING AMERICA’S HEALTHCARE SYSTEM THROUGH CHOICE AND COMPETITION 50 (2018) (footnote omitted), https://home.treasury.gov/system/files/136/Reforming_Americas_Healthcare_System_Through_Choice_and_Competition.pdf.

5. *Id.* at 109-10.

6. Alex Spanko, *Trump Cabinet Calls on States to Eliminate Certificate of Need Laws*, SKILLED NURSING NEWS (Dec. 4, 2018), <https://skillednursingnews.com/2018/12/trump-cabinet-calls-states-eliminate-certificate-need-laws/> (last visited Nov. 20, 2019) (citation omitted).

therefore necessary to control costs, utilization, and distribution of new health service facilities and the bed complements of these health service facilities.⁷

The burden upon taxpayers is not the only consideration in such laws. For example, the CON law in Illinois also considers “the financial burden to patients caused by unnecessary health care construction and modification.”⁸

Contrary to the Trump Administration’s assertions, such consumer protection laws are not an effort to impair competition. As the Georgia Supreme Court noted in its decision upholding the state’s CON law: “The record in this case makes quite clear that the market for healthcare is not normal; indeed, there are few (if any) other private sector markets so dominated by government regulation.”⁹ A CON law, the court maintained, “does not authorize monopolistic ‘contracts’ relating to providers of new institutional health services. It only requires that all such providers obtain a CON before adding new services.”¹⁰

Given the scale of regulation, and heavy involvement of government payers, much of health care is not a *free* market, yet many have made the “free market” argument that CON laws are anti-competitive. For example, as Harvard Professor David Grabowski asserts:

Nursing homes have argued that certificate of need allows them to keep sufficient occupancy levels to cover their costs. This guaranteed occupancy is a boon for nursing homes, but hurts consumers. If a nursing home cannot maintain sufficient occupancy without certificate of need, it is likely a sign that the nursing home is not providing adequate quality.¹¹

7. N.C. GEN. STAT. § 131E-175(1) (2018).

8. 20 ILL. COMP. STAT. 3960/2 (2018).

9. *Women’s Surgical Center, LLC v. Berry*, 806 S.E.2d 606, 612 n.7 (Ga. 2017).

10. *Id.* at 611.

11. David Grabowski, *Nursing Home Certificate-Of-Need Laws Should Be Repealed*, HEALTH AFFAIRS (June 9, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170609.060529/full/> (citation omitted). Grabowski’s unsupported assertion that only poor-quality facilities struggle with occupancy is an insult to the residents and staff displaced by the closures of quality facilities. For example, consider the closure of this nonprofit facility that “took pride in its five-star rating on Medicare’s Nursing Home Compare website”: “For more than 40 years, Morningside Ministries operated a nursing home in San Antonio, caring for as many as 113 elderly residents. The facility, called Chandler Estate, added a small independent living building in the 1980s and an even smaller assisted living center in the 90s, all on the same four-acre campus. The whole complex stands empty now. Like many skilled nursing facilities in recent years, Chandler Estate had seen its occupancy rate drop.” Paula Span, *In the Nursing Home, Empty Beds and Quiet Halls*, N.Y. TIMES, Sept. 28, 2018, <https://www.nytimes.com/2018/09/28/health/nursing-homes-occupancy.html>. In Maine, with the nation’s oldest population, six nursing homes closed in 2018, and no one stepped up to buy them. See Jackie Farwell, *Record number of Maine nursing homes closed this year, displacing hundreds*, BANGOR DAILY NEWS (Dec. 12, 2018), <https://bangordailynews.com/2018/12/12/mainefocus/record-number-of-maine-nursing-homes-closed-this-year-displacing-hundreds/> (“The personal toll of the closures on the

Professor Grabowski maintains that “[c]ertificate-of-need laws discourage innovation in a sector badly in need of modernization.”¹²

Such arguments badly miss the mark. Although CON laws sweep up other health care services,¹³ especially hospitals,¹⁴ this Article focuses particularly upon the fraught economics of nursing home care relative to CON laws in arguing that such laws should be maintained. The Trump Administration has gone so far as to officiously-intermeddle in Alaska and urge its CON law be repealed.¹⁵

In a rural, unpopulous state like Alaska, what would be the value proposition of unrestrained new nursing home care infrastructure? Nursing homes in Alaska can be as small as the 18-bed Quyanna Care Center serving tribal elders in Nome, where staff “often solicit donations of traditional food, including game meat, fish, berries, eggs, and more.”¹⁶ Does Nome need more nursing homes? Furthermore, Republican Governor Mike Dunleavy began his first term in 2019 with a devastating proposed cut to Alaska’s Medicaid program.¹⁷

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elderly and their families is acute, said Trish Thorsen, program manager for the Maine Long-Term Care Ombudsman Program, which advocates for nursing home residents.”)

12. Grabowski, *supra* note 11. In making his libertarian case against CON laws, Grabowski exults that “[f]ourteen states, including most recently New Hampshire in 2016, have discontinued their certificate-of-need law.” *Id.* Actually, New Hampshire has maintained a moratorium on nursing home beds. *See* N.H. REV. STAT. ANN. § 151:2, VI(a) (2018) (“No new license shall be issued for, and there shall be no increase in licensed capacity of, any nursing home, skilled nursing facility, intermediate care facility, or rehabilitation facility, including rehabilitation hospitals and facilities offering comprehensive rehabilitation services.”).

13. *See, e.g.*, WASH. REV. CODE § 70.38.105(4)(h) (2018) (requiring CON approval for “[a]ny increase in the number of dialysis stations in a kidney disease center.”).

14. Although hospitals are not addressed by this essay, much of the anticompetitive “merger frenzy” that has occurred has been driven by forces “unleashed” by the Affordable Care Act, not CON laws. *See, e.g.*, Ali Deatherage, *Antitrust & Healthcare Consolidation: St. Luke’s and the Failure of the Efficiencies Defense*, 19 *TRANSACTIONS* 737 (2018) (“The ACA implemented several changes to increase quality of care that inherently incentivized entities to integrate.”).

15. *See* Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Regarding Certificate-of-Need (CON) Laws and Alaska Senate Bill 62, Which Would Repeal Alaska’s CON Program (Apr. 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding/v170006_ftc-doj_comment_on_alaska_senate_bill_re_state_con_law.pdf.

16. NORTON SOUND HEALTH CORP., FISCAL YEAR 2017 ANNUAL REPORT 15, <https://www.nortonsoundhealth.org/wp-content/uploads/FY17-Annual-Report.pdf>.

17. *See* Sean Maguire, *Senators grill administration on healthcare: ‘You are playing with people’s lives with this budget’*, KTUU (Feb. 23, 2019, 8:02 AM), <https://www.ktuu.com/content/news/Senators-grill-administration-on-healthcare-You-are-playing-with-peoples-lives-with-this-budget-506242341.html>.

An annual report to Congress by the Medicare Payment Advisory Commission in March 2019 found nursing homes nationally, in 2017, were only at a 0.5% margin—or actually, in the negative (-2.4%) if Medicare payments were excluded.¹⁸ Nationally, Medicaid spending on nursing home care only went up 0.9% in 2016 and 0.7% in 2017, according to federal data.¹⁹ The head of the nation’s leading trade group for nursing home care has declared this “our toughest time, ever” in the 25 years he has been in the sector.²⁰ The largest nursing home providers nationwide have come close to, or have gone through, bankruptcy.²¹ It has also been reported that “[t]he 31 largest metropolitan markets have 13,586 fewer nursing home beds now than in late 2005[.]”²² Yet, there still exists the need for nursing home care, as an estimated one-third of those 65-and-older will utilize it at some point in their lifetime.²³

A May 2018 report noted that “[h]ome and community-based services (“HCBS”) have accounted for almost all Medicaid Long Term Services and Supports (“LTSS”) growth in recent years while institutional service expenditures remained close to the 2010 fiscal year amount.”²⁴ In total, HCBS spending accounted for 57% of Medicaid long-term care spending in 2016.²⁵ This proportion was as high as 81% for Oregon, and as low as 27% for Mississippi.²⁶

18. See MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 196 (2019), http://www.medpac.gov/docs/default-source/reports/mar19_medpac_entirereport_sec.pdf?sfvrsn=0. A presentation in December 2019 reported that the average margin for nursing homes had actually fallen into the negative at -.03 percent. See Carla Carter, Assessing payment adequacy and updating payments for skilled nursing facilities 12, MEDICARE PAYMENT ADVISORY COMM’N (Dec. 5, 2019), <http://www.medpac.gov/docs/default-source/default-document-library/snf-final-dec-2019-public32ce12adfa9c665e80adff00009edf9c.pdf?sfvrsn=0> (last accessed Dec. 23, 2019).

19. U.S. CTRS. FOR MEDICARE & MEDICAID SERVICES, HISTORICAL, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html> (open NHE Tables zip file, then open Table 15).

20. Marty Stempniak, *AHCA chief Parkinson: This is our ‘toughest time,’ offers tips to turn the tide*, MCKNIGHT’S LONG-TERM CARE NEWS (Oct. 9, 2018), <https://www.mcknights.com/news/skilled-nursing-chief-parkinson-this-is-our-toughest-time-offers-tips-to-turn-the-tide/>.

21. See, e.g., Harold Brubaker, *Genesis Healthcare takes \$532 million write-down, warns of possible bankruptcy*, PHILADELPHIA INQUIRER (Nov. 8, 2017); Soma Biswas, *HCR Manor-Care Files for Bankruptcy*, WALL STREET J. (ONLINE) (Mar. 5, 2018).

22. Span, *supra* note 11.

23. See KAISER FAMILY FOUND., MEDICAID’S ROLE IN NURSING HOME CARE 2, (June 20, 2017), <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/>.

24. STEVE EIKEN, KATE SREDL, ET AL., IBM WATSON HEALTH, MEDICAID EXPENDITURES FOR LONG TERM SERVICES AND SUPPORTS (LTSS) IN FY 2016 i (2018), <https://www.medicare.gov/medicaid/ltss/downloads/reports-and-evaluations/ltss expenditures 2016.pdf>.

25. See *id.* at 6.

26. See *id.* at 7.

In a comparison of two states—Oregon and Texas—Oregon has a CON law for hospitals and nursing homes.²⁷ In addition to dedicating the highest proportion of Medicaid dollars in the United States to HCBS, it has one of the highest payments for its declining nursing home population. In particular, the 2019 “basic” nursing home payment rate in Oregon was \$326.50 per patient day.²⁸

Laissez-faire Texas has no CON law. Has this led to robust business opportunity and competition, as the Trump Administration might have us imagine? Far from it. In December 2018, “Senior Care Centers, which operates more than 100 facilities in Texas, filed for reorganization in U.S. bankruptcy court for the Northern District of Texas . . . reporting more than \$100 million in debt.”²⁹ In Texas, “[t]he average difference between the cost of providing care to a Medicaid resident and the reimbursement is \$27 per patient per day”³⁰ and the average Medicaid rate is well less than half of Oregon’s.³¹

Nursing homes have been required, under the Balanced Budget Act (“BBA”) of 1997,³² to file detailed cost reports that are then audited by states.³³ In making his case against CON laws, Professor Grabowski relied upon a twenty-one-year-old study that predates the BBA by years; studying a period from 1979 to 1993.³⁴ Professor Grabowski argued that “nursing home certificate-of-need laws lower access”³⁵ and quality.³⁶

It is hard to argue CON laws have impaired access at a time when nursing home occupancy is at an all-time low.³⁷ At the risk of disagreeing with an author’s interpretation of his own research, Grabowski’s 2004 article does not support his 2017 assessment that CON laws lower quality. His 2004 article acknowledged that “[l]ow Medicaid payment rates may not provide

27. See OR. REV. STAT. § 442.315 (2018).

28. See OR. DEP’T HUM. SERVICES, RATE SCHEDULE (Oct. 1, 2019), <http://www.dhs.state.or.us/spd/tools/program/osip/rateschedule.pdf>.

29. Holly K. Hacker & Sue Ambrose, *Texas’ largest nursing home operator files for bankruptcy, sparking concerns about patients, jobs*, DALLAS MORNING NEWS (Dec. 5, 2018).

30. Maggie Flynn, *Bill to Boost Medicaid Rates for Texas Nursing Homes Dies Before a Vote*, SKILLED NURSING NEWS (June 2, 2019), <https://skillednursingnews.com/2019/06/bill-to-boost-medicaid-rates-for-texas-nursing-homes-dies-before-a-vote/>.

31. See Maggie Flynn, *Texas Floats Plans to Boost Medicaid Funding Through SNF Quality Program*, SKILLED NURSING NEWS (Mar. 11, 2019) (“The average daily Medicaid rate per day is \$143”), <https://skillednursingnews.com/2019/03/texas-floats-plan-to-boost-snf-reimbursement-through-quality-focused-program/>.

32. Balanced Budget Act of 1997, Pub. L. No. 105–33, 111 Stat. 251 (1997).

33. See, e.g., 42 U.S.C. § 1395yy(d)(5) (2018) (“The Secretary shall provide for a simplified cost report to be filed by facilities being paid”).

34. See Grabowski, *supra* note 11.

35. *Id.*

36. *Id.*

37. That argument would also ignore the advent of home-and-community-based services, as an alternative for those not needing nursing home care, since its antique source was published.

nursing homes with adequate resources to provide sufficient quality, and CON laws and moratoria may impede quality competition for Medicaid recipients.”³⁸ The former seems obvious, while the latter is harder to prove. And, indeed, it was not proven:

Higher Medicaid payment was shown to be associated with better nursing home quality across all nursing home markets. This result was modified in the most restrictive nursing home markets, which provided some evidence that CON and moratoria may have a negative effect toward the provision of nursing home quality. However, we must note that—unlike some previous analyses—we were not able to show a negative relationship between Medicaid payment and nursing home quality in the most restrictive markets.³⁹

In other words, restricting bed availability did *not* reduce quality. Paradoxically, the article further asserts, in a conclusory, unsupported way: “[t]his study provides strong evidence that a repeal of CON and moratorium policies would encourage greater quality competition for the care of Medicaid residents in the most restrictive markets.”⁴⁰ Really?

In his 2017 piece, Professor Grabowski cites to a 1994 article to support his assertion that CON laws raise private-pay rates.⁴¹ This alleged causality is severely dated. In fact, 62% of nursing home residents nationally are on Medicaid, and there are relatively-few private-paying residents.⁴² It is

38. See Grabowski, *supra* note 11 at 794.

39. *Id.* at 807 (emphasis added).

40. *Id.* at 810. Nursing homes are held to *federal* quality standards; under federal law, for example, “[a] skilled nursing facility must provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident . . .” 42 U.S.C. CODE § 1395i-3(a)(2) (2014).

41. See Grabowski, *supra* note 11. By relying upon dated research, Grabowski is also ignoring the more recent advent of “Managed Long-Term Services and Supports,” where private insurance companies administer Medicaid long-term care and siphon off a considerable amount of its funding. See Brendan Williams, *Leap of Faith: Managed Care and the Privatization of Medicaid Long-Term Care Services*, 30 LOY. CONS. L. REV. 438 (2018); see also Maggie Flynn, *Non-Profit Texas SNFs Forced to Close Amid Low Medicaid Rates*, SKILLED NURSING NEWS (Feb. 4, 2018), <https://skillednursingnews.com/2018/02/non-profit-texas-snfs-forced-close-amid-low-medicaid-rates/> (reporting that the deleterious effects of low Medicaid rates is compounded by the fact that “Texas has now included nursing facilities in managed care for Medicaid for almost three years, which has created a different set of billing problems; some nursing homes have had to hire additional billing people to deal with payment issues instead of direct care staff . . .”).

42. Medicaid’s Role in Nursing Home Care, *supra* note 23. According to a 2017 study of CON laws by three academics: “We find that states with CON laws experience higher health care prices, but that this difference is not statistically significant.” James Bailey, ET AL., *Certificate of Need Laws and Health Care Prices*, J. OF HEALTH CARE FIN. 3 (Spring 2017). Moreover, in 2017, “[a]ssisted living facilities increased the most at 6.67 percent, followed by a semi-private room in a nursing home at 4.11 percent.” Michelle Singletary, *The price of living longer: You could pay \$100,000-plus a year for nursing home care*,

axiomatic that what *does* raise private-pay rates are states' failures to fund care costs for the largest proportion of residents.

It would also seem logical that the greater risk to quality would be a diminishment of Medicaid resources due to new entrants into the Medicaid market. That is assuming, of course, that new nursing homes would care for the medically-indigent on Medicaid, as most facilities do. According to federal government data, Medicare's higher payments are what sustain most nursing homes, which operate at a loss if Medicare payments are excluded.⁴³ Contrary to what many might assume, Medicare only pays for nursing home care following a qualifying 3-day hospital stay.⁴⁴ A brand-new facility, as opposed to renovation or replacement of an existing facility, might be constructed primarily for the purpose of attracting Medicare patients, to the detriment of surrounding facilities.⁴⁵

Much of the agitation against CON laws is driven by the Mercatus Center at George Mason University,⁴⁶ which the Trump Administration cites as an authority in its jeremiad against CON laws.⁴⁷ The board of directors is comprised of a "Who's-Who" of leading conservatives, including Charles Koch; Brian Hooks, the president of the Charles Koch Foundation and the Charles Koch Institute; Richard Fink, vice chairman of the board of directors

WASH. POST (Nov. 18, 2018), <https://www.washingtonpost.com/business/2018/11/19/price-living-longer-you-could-pay-plus-year-nursing-home-care/>.

43. REPORT TO THE CONGRESS, *supra* note 18.

44. See 42 U.S.C. CODE § 1395d(a)(2)(a) (2005); *see also* 42 U.S.C. CODE § 1395x(i) (2018) ("The term 'post-hospital extended care services' means extended care services furnished an individual after transfer from a hospital in which he was an inpatient for not less than 3 consecutive days before his discharge from the hospital in connection with such transfer.").

45. In a CON state, even nursing home renovations can be subject to the CON process, as there is a Medicaid share-of-cost associated with them. For example, in Washington the CON process governs "[a]ny capital expenditure for the construction, renovation, or alteration of a nursing home which exceeds the expenditure minimum as defined by RCW 70.38.025." WASH. REV. CODE § 70.38.105(4)(d) (2018). That statutory minimum is \$1 million, but is adjusted by rule to reflect inflation. See WASH. REV. CODE § 70.38.025(5) (2018). While CON *can* have the effect of keeping facilities out-of-date, that is as much a function of Medicaid reimbursement even in states that do not have CON laws. For example, in Pennsylvania the capital component of reimbursement is arbitrarily based upon "an assigned cost of \$26,000 per allowable bed" in a statute that has not been amended since 2010. PA. CODE § 1187.57(1) (2018).

46. See, e.g., Mathew D. Mitchell, Testimony Before the Senate Labor & Commerce Committee: Alaska's Certificate-of-Need Law, (Feb. 6, 2018), https://www.mercatus.org/system/files/mitchell_-_testimony_-_alaska_con_testimony_-_v1.pdf ("CON laws perform a valuable function for incumbent providers of healthcare services by limiting their exposure to new competition. Indeed, recent evidence suggests that special interests are able to use political donations to increase the odds that their CON requests will be granted.").

47. See Reforming America's Healthcare System Through Choice and Competition, *supra* note 4, at 50 n. 170.

of the Charles Koch Foundation and the Charles Koch Institute; and former Reagan Administration Attorney General, Edwin Meese.⁴⁸

As the New York Times reported in 2018, “documents reveal in surprising detail that for years, as George Mason grew from a little-known commuter school to a major public university and a center of libertarian scholarship, millions of dollars in donations from conservative-leaning donors like the Charles Koch Foundation had come with strings attached.”⁴⁹ Among other things, donors were given “decision-making roles in selecting candidates for key economics appointments at the Mercatus Center, a Koch-funded think tank on campus that studies markets and regulation.”⁵⁰ Another “think tank” cheering on the opposition to CON laws is the anti-regulatory Heartland Institute,⁵¹ known for its strong denials that climate change is real.⁵²

Rural states would hardly benefit from the overturning of limits on nursing home beds. When a nonprofit nursing home, operated by the Good Samaritan Society in Selby, South Dakota (population less than 700), was going to close, “the town and surrounding region rallied to raise \$500,000.”⁵³

48. See Board of Directors, Mercatus Center, <https://www.mercatus.org/board> (last visited Nov. 20, 2019), <https://www.mercatus.org/board>.

49. Erica L. Green & Stephanie Saul, *What Charles Koch and Other Donors to George Mason University Got for Their Money*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/05/us/koch-donors-george-mason.html>.

50. *Id.* One 2016 article noted that “Koch-funded researchers make a larger impact in the public arena. They frequently testify before Republican-led committees in Congress. Their work often guides lawmakers, particularly conservatives, at the state level in drafting legislation[.]” Jim Tankersley, *Inside Charles Koch’s \$200 million quest for a ‘Republic of Science’*, WASH. POST (June 3, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/03/inside-charles-kochs-200-million-quest-for-a-republic-of-science/>. However, the academics funded by Koch are not highly-regarded academically. See *id.*

51. See Arianna Wilkerson, *The Leaflet: Choice and Competition will Cure America’s Health Care Crisis*, HEARTLAND INST. (Dec. 7, 2018), <https://www.heartland.org/publications-resources/publications/the-leaflet-choice-and-competition-will-cure-americas-health-care-crisis/> (“CON laws, which require new medical providers to prove to local government that additional medical facilities or services are needed, favor existing medical providers. CON laws significantly reduce competition, leaving consumers with fewer high-quality health care choices.”), <https://www.heartland.org/publications-resources/publications/the-leaflet-choice-and-competition-will-cure-americas-health-care-crisis/>; see also Matthew Glans, *Research & Commentary: Georgia Considers Ending Certificate of Need Laws*, HEARTLAND INST. (Feb. 22, 2018), <https://www.heartland.org/publications-resources/publications/research-commentary-georgia-considers-ending-certificate-of-need-laws?source=policybot> (citing a “Mercatus study” that purportedly shows “Georgia would have 51 more health care facilities in the state, including 38 additional rural hospitals, if it did not have CON requirements.”).

52. See Katie Worth, *Climate Change Skeptic Group Seeks to Influence 200,000 Teachers*, PBS (Mar. 28, 2017), <https://www.pbs.org/wgbh/frontline/article/climate-change-skeptic-group-seeks-to-influence-200000-teachers/> (“The campaign comes at a time when Heartland’s influence on national climate policy is at an apex.”).

53. Victoria Lusk, *As two more nursing homes prepare to close, no solution in sight for South Dakota’s crisis*, ABERDEEN AM. NEWS (Dec. 27, 2018),

Additionally, “[c]ommunity members from Selby, Java and Glenham founded a nonprofit agency, Walworth County Care Center, which took over operations of the nursing home Dec. 1.”⁵⁴ Does Selby seem like a market needing more “competition”?

In the state of Washington, a “wave of nursing home closures” included a Seattle facility which has, since 1976, been dedicated to the “culturally sensitive care to the area’s Asian and Pacific Islander community.”⁵⁵ One four star-rated facility closing in Longview, Washington—displacing 38 residents—cited the state’s failure to compensate for a rising minimum wage in its Medicaid reimbursement.⁵⁶

Where would the *workforce* come from for new nursing homes? In North Dakota, an editorial regarding facilities on a federal “watch list” for quality concerns noted that “[f]our of the five homes on the watch list are in smaller North Dakota communities. It’s more difficult to find and keep staff in rural areas. Many homes also face financial issues.”⁵⁷ South Dakota is among many states suffering from “a shortage of qualified employees in a field with generally low salaries[.]”⁵⁸ Twenty-one percent of all nursing assistants in nursing homes are immigrants,⁵⁹ and yet the Trump Administration is advocating severe immigration restrictions likely to impair the existing long-term care workforce.⁶⁰

Where would the *means* come from to attract and retain new caregivers? The same Trump Administration officials, and “free market” conservatives, urging more nursing home beds have also supported past federal Medicaid

<https://www.inforum.com/lifestyle/health/941101-As-two-more-nursing-homes-prepare-to-close-no-solution-in-sight-for-South-Dakotas-crisis>.

54. *Id.*

55. Austin Jenkins, *Families scramble, industry sounds alarm as nursing home closures climb in Washington*, N.W. NEWS NETWORK (June 24, 2019), <https://www.nwnewsnetwork.org/post/families-scramble-industry-sounds-alarm-nursing-home-closures-climb-washington>.

56. Kimberly Marselas, *Rising minimum wage a factor in 4-star nursing home’s closure*, MCKNIGHT’S LONG-TERM CARE NEWS (July 7, 2019), <https://www.mcknights.com/news/rising-minimum-wage-a-factor-in-4-star-nursing-homes-closure/>.

57. Editorial, *Transparency to selecting a nursing home*, BISMARCK TRIB. (July 21, 2019), https://bismarcktribune.com/opinion/editorial/transparency-to-selecting-a-nursing-home/article_21c10378-0630-5945-bf4a-f54e050fcab3.html.

58. Bart Pfankuch, *Wave of nursing home closures hitting small South Dakota communities*, SOUTH DAKOTA NEWS WATCH (Dec. 12, 2018), <https://www.sdnewswatch.org/stories/wave-of-nursing-home-closures-hitting-small-south-dakota-communities/>.

59. U.S. Nursing Assistants Employed in Nursing Homes: Key Facts 3 (2019), PARAPROFESSIONAL HEALTH INST. (Sept. 3, 2019), <https://phinational.org/resource/u-s-nursing-assistants-employed-in-nursing-homes-key-facts-2019/>.

60. See, e.g., Melissa Bailey, *As Trump Targets Immigrants, Elderly Brace to Lose Caregivers*, WASH. POST (Mar. 24, 2018), https://www.washingtonpost.com/national/health-science/as-trump-targets-immigrants-elderly-and-others-brace-to-lose-caregivers/2018/03/24/72d5a0d0-2d3e-11e8-8ad6-fbc50284fce8_story.html.

cuts that would have been devastating to nursing home care.⁶¹ Current state funding is hardly robust enough in most states to be diluted among new facilities. In the state of Washington, the reported gap between care costs and the Medicaid rate is \$43 per patient, per day.⁶² In November 2019, New York nursing home provider groups and the leading union for caregivers filed suit over a Medicaid cut to nursing home care that they described as amounting to \$352 million a year.⁶³

Considerable progress has been made in recognizing the entire continuum of long-term care. The states that have invested more in HCBS have also tended to have CON laws limiting nursing home beds.⁶⁴ Do we really want to go backwards and encourage unnecessary nursing home bed utilization?⁶⁵

Indeed, in Oregon the CON law for nursing homes is expressly tied to the state's leadership in developing HCBS options, as described in a recent change in the law (effective in 2020): "Oregon has established itself as the national leader in providing a choice of noninstitutional care to low income Oregonians in need of long term care services by developing an extensive system of home health care and community-based care[.]"⁶⁶ A limitation upon nursing home beds does not, in the estimation of the Oregon Legislature, diminish the need for nursing home care: "Long term care facilities continue to provide critical services to some of Oregon's most frail and vulnerable residents with complex needs. Increasingly, long term care facilities

61. See, e.g., Jordan Rau, *Medicaid Cuts May Force Retirees Out of Nursing Homes*, N.Y. TIMES (June 24, 2017).

62. See Marselas, *supra* note 56.

63. Denis Slattery, *1199 union members, caregivers and advocates blast state over Medicaid cuts to nursing homes*, N.Y. DAILY NEWS (Nov. 4, 2019), <https://www.nydailynews.com/news/politics/ny-union-members-advocates-medicaid-nursing-homes-cuts-funding-20191105-n3utnkrre5eavp6t4ylwjmklhu-story.html> ("The Medicaid funding cut, which will take effect Wednesday, will impact more than 600 nursing homes and more than 100,000 nursing home residents, advocates said.").

64. Of the ten states ranking highest in HCBS as a proportion of Medicaid long-term care spending, seven have CON laws or a limit on nursing home beds. Compare Steve Eiken, Kate Sredl, et al, *supra* note 24, with CON-Certificate of Need Laws, Nat'l Conf. of State Legislatures (Aug. 17, 2018), <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.

65. In 1998, an Urban Institute paper had predicted controls might eventually be needed on HCBS growth: "The expansion of alternatives to nursing home care – especially the expansion of residential facilities – necessitates that states look beyond nursing homes in their effort to regulate long-term care supply. This need will become especially germane as an increasing portion of Medicaid long-term care spending goes to these nursing home alternatives. In the case of residential facilities, at least, states are struggling with how to regulate an industry that has flourished – in part – because of minimal government regulation." Joshua Wiener, David L. Stevenson, et al., *Controlling the Supply of Long-Term Care Providers at the State Level* 15, URBAN INST. (Dec. 1998), <http://webarchive.urban.org/UploadedPDF/occ22.pdf>.

66. 2013 OR. LAWS Ch. 608 § 15 (b).

are filling a need for transitional care between hospitals and home settings in a cost-effective manner, reducing the overall costs of long term care.”⁶⁷

In conclusion, the nursing home care sector is already fraught enough without the federal government leaning on states to surrender their autonomy to decide the need for new health care facilities.⁶⁸ A one-size-fits-all “free market” approach cannot be taken to what is, primarily, a single-payer system where the payers are parsimonious state governments.

The Trump Administration’s proposal whitewashes a human tragedy. For example, at a time when nursing homes in Nebraska are closing and “scattering the poorest residents across the plains” as far away as North Dakota and Wyoming, there is a special sort of cruelty in suggesting that a rural state like Nebraska – where reimbursement is “\$40 less per day than the cost of providing care” – simply needs more nursing homes.⁶⁹ The real answer must be to shore up our *existing* infrastructure for skilled nursing and rehabilitative care before it collapses.

67. *Id.* § 15 (c).

68. The Trump Administration has proved to be often intrusive to states’ rights. See Michael Stratford, *Trump endorses states’ rights—but only when he agrees with the state*, POLITICO (Apr. 2, 2018), <https://www.politico.com/story/2018/04/02/trump-states-rights-education-sanctuary-drilling-492784>. It has suggested using its authority to approve Medicaid waivers as a means of forcing states to repeal CON laws. See Susannah Luthi, *Trump administration could leverage waivers for state CON law repeals*, MOD. HEALTHCARE (Dec. 8, 2018), <https://www.modern-healthcare.com/article/20181208/NEWS/181209933/trump-administration-could-leverage-waivers-for-state-con-law-repeals> (“It’s interesting the administration would suggest that all states comply with this mandate or recommendation,” said Ethan James of the Georgia Hospital Association. ‘I always thought the administration was going to push states’ rights issues.’”).

69. Elis Saslow, *Traveling the loneliest road*, WASH. POST (Dec. 21, 2019).