
ARTICLE

DEFENDING VOTING RIGHTS IN LONG-TERM CARE INSTITUTIONS

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ABSTRACT

An estimated 2.2 million Americans live in long-term care facilities in the United States. Many of these Americans—perhaps the majority—would vote if voting were accessible to them. Unfortunately, as we show, long-term care residents face systemic disenfranchisement. Specifically, based on our systematic review of nursing home investigation reports, we present disturbing new empirical evidence that demonstrates how burdensome election procedures, profound isolation, and widespread failure by facilities to provide required assistance prevent long-term care residents from voting. Noting that entities traditionally enforcing voting rights have largely ignored these problems, we call for a new wave of voting rights litigation aimed at dismantling barriers to long-term care voter participation and provide a roadmap for how existing law could be employed in such litigation. Finally, continued disenfranchisement of long-term care residents has profound implications not only for older adults and people with disabilities but also for democratic legitimacy. We conclude by unpacking ways in which protecting the voting rights of long-term care residents could be part of a broader agenda of reducing racial and class-based disparities in access to the ballot and sustaining a democratic system of governance.

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INTRODUCTION

Older adults vote in record numbers. More than three-quarters of U.S. citizens over the age of sixty-five are registered to vote, and over seventy percent voted in the 2020 presidential election—rates that exceed any other segment of the population.¹ Yet one group of older adults increasingly faces profound barriers to voting: residents of long-term care institutions.

In this Article, we provide new and disturbing evidence of barriers to voting faced by the approximately 2.2 million Americans living in nursing homes and assisted living facilities, including data from our systematic review of nursing home inspection reports.² This evidence reveals the myriad of ways in which these long-term care residents are disenfranchised, the frequency with which nursing homes are cited for undermining residents' voting rights, and the meager consequences facilities currently face for this behavior. Indeed, out of the more than one hundred voting rights violations documented in the nursing home inspections we reviewed, not one violation was categorized as causing more than "minimal" or "potential for minimal" harm, even when facilities disenfranchised residents by effectively preventing them from voting.³

We show how existing law could—and should—be used to protect long-term care residents' fundamental right to vote. Specifically, we explore how state election laws and federal statutes, including the Nursing Home Reform Act ("NHRA"), the Voting Rights Act ("VRA"), the National Voter Registration Act ("NVRA"), and the Americans with Disabilities Act ("ADA") could be used to enforce residents' voting-related rights. Together, these statutes can protect residents' rights to access the polls and mail-in ballots, as well as their rights to assistance with registering to vote and assistance with obtaining and completing ballots.

We conclude by examining the consequences that disenfranchising long-term care residents has for a democratic system of governance and society more broadly. As we explain, the disenfranchisement of long-term care residents is not a trivial issue. Residents' votes could be decisive in critical races. More fundamentally, voting may be the only remaining source of political power that many long-term care residents have. Without the ability to vote, they may be unable to defend their common interests—interests often pushed to the wayside.

By identifying voting barriers affecting residents and avenues to protect their voting rights, we hope to inspire much-needed enforcement action. Though considerable litigation has focused on advancing voting rights, little attention has been paid to the voting rights of those in long-term care institutions—not even during the COVID-19 pandemic when hundreds of thousands of long-term care residents could not access normal avenues of assistance and faced

¹ *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Apr. 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> (breaking down registration rates and voting rates by age group and state).

² See *infra* Part I.

³ See *infra* Section II.A.1.

disenfranchisement.⁴ When residents are disenfranchised without objection, it sends a powerful message that these individuals are not full citizens or worthy of respect. Such a message risks entrenching the ableist and ageist attitudes that fostered the conditions that led to disenfranchisement in the first place. By contrast, litigation on behalf of this population has the potential to both reduce obstacles to voting at long-term care facilities and, more broadly, elevate the political interests of aging and disabled populations.

This Article comes at a time when there is increasing scholarly interest in the voting rights of people with disabilities. This interest reflects mounting concern about “the fragility of elections systems”⁵ in general, as well as specific concern about cumbersome election procedures disproportionately disenfranchising people with disabilities.⁶ Such concerns are intensifying as states and election officials respond to partisan claims of election fraud by restricting how and where citizens may vote.⁷ This Article is the first, however, to comprehensively consider the voting rights of citizens who are residents of long-term care institutions, the feasibility of such residents exercising their voting rights, and how existing law could be used to protect these rights. To the extent that other scholars have focused on voting by long-term care residents, it has been primarily to provide a historical understanding of voting practices and their implications,⁸ or to call for restrictions on those rights.⁹ Indeed, the most significant article to date to focus on the voting rights of contemporary long-term care residents recommended that long-term care facilities subject residents to formal cognitive screening tests to determine whether they should be allowed

⁴ See *infra* Section II.A.1.

⁵ See, e.g., Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right To Vote*, 96 N.Y.U. L. REV. 1127, 1152 (2021) (discussing how “arrival of COVID-19 and the novel challenges it imposed laid bare the fragility of elections systems,” including barriers to voting experienced by people with disabilities).

⁶ See, e.g., Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1513-15, 1521-22 (2016) [hereinafter Belt, *Contemporary Voting*] (examining how existing law could be used to address voting barriers experienced by a wide range of voters with disabilities and discussing importance of protecting voting rights of persons with disabilities).

⁷ For example, in *Merrill v. People First of Alabama*, 141 S. Ct. 25 (2020), Justice Sonia Sotomayor explained in her dissent how Alabama’s ban on curbside voting even during the COVID-19 pandemic disproportionately burdened the voting rights of individuals with disabilities. See *id.* at 26 (Sotomayor, J., dissenting) (noting in-person voting entailed higher risks for disabled individuals because they were more likely to suffer disease-related fatalities).

⁸ See generally Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. REV. 857 (2021) [hereinafter Belt, *Mass Institutionalization*] (providing historical account of steps states have taken to disenfranchise civilly institutionalized persons).

⁹ See, e.g., Jason H. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, Constantine Lyketsos, Bryan James, David Knopman, Christopher Patusky, Rosalie A. Kane & Pamela S. Karlan, *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345, 1348 (2004) [hereinafter Karlawish et al., *Addressing*] (suggesting nursing home residents should be screened for capacity to vote).

to vote¹⁰—an approach that, while different in intent, is reminiscent of that used to disenfranchise Black voters during the Jim Crow era. This Article, by contrast, looks at voting rights of residents from a civil rights perspective, and considers how the law might be used to defend—not undermine—these citizens’ fundamental right to vote.

This Article proceeds in four parts. Part I presents an overview of long-term care voters and their fundamental right to vote. Part II draws upon our original empirical research to show how long-term care residents are systemically disenfranchised by facility-level practices, burdensome election procedures, and state statutes that specifically restrict their ability to obtain voting-related assistance. Part III then considers a range of federal and state statutes that could be used to defend the voting rights of long-term care residents, and how they might be used to greatest effect. Finally, Part IV explores the profound failure to protect the voting rights of long-term care residents and how this nonenforcement norm reflects a potent mixture of ageism and ableism. It concludes by calling for a new wave of voting rights litigation aimed at dismantling barriers to long-term care voter participation. As part of this call, we consider how protecting the voting rights of long-term care residents could support a broader agenda of not only reducing racial and class-based disparities in access to the ballot but also maintaining democratic legitimacy.

I. OVERVIEW OF THE LONG-TERM CARE VOTING POPULATION

In the United States, more than 1.1 million people live in nursing homes,¹¹ healthcare institutions that provide both skilled medical care and custodial care to individuals with substantial chronic-care needs. In addition, more than 800,000 individuals live in assisted living facilities,¹² a varied group of institutions that provide some combination of housing, meals, and health-related services to adults with a broad range of care needs.¹³ Together, they are among the oldest and most highly disabled groups of Americans. Nearly two-thirds need

¹⁰ See Karlawish et al., *Addressing*, *supra* note 9, at 1347 (recommending nursing homes screen residents for voting capacity).

¹¹ *Total Number of Residents in Certified Nursing Facilities*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/> [<https://perma.cc/Z4DG-9F3U>] (last visited Apr. 18, 2023) (reporting 1,157,714 certified nursing facility residents as of 2022).

¹² LAUREN HARRIS-KOJETIN, MANISHA SENGUPTA, JESSICA PENN LONDON, VINCENT ROME, ROBERTO VALVERDE & CHRISTINE COFFREY, *LONG-TERM CARE PROVIDERS AND SERVICES USERS IN THE UNITED STATES, 2015-2016*, at 18 (2019) (reporting “811,500 current residents living in residential care communities”).

¹³ For an overview of the regulatory difference between these two types of facilities, see Nina A. Kohn, *Humane and Resilient Long-Term Care: A Post-COVID-19 Vision*, in *COVID-19 AND THE LAW: DISRUPTION, IMPACT, AND LEGACY* (I. Glenn Cohen, Abbe R. Gluck, Katherine Kraschel & Carmel Schachar eds., forthcoming 2023) (manuscript at 3) (on file with author) (noting that assisted living facility regulation generally takes place at state level and is less comprehensive than that for nursing homes).

assistance with at least three activities of daily living, such as walking, bathing, and dressing.¹⁴ The majority are at least eighty-five years of age.¹⁵ In addition, slightly more than two-thirds are female,¹⁶ in part due to the longer life expectancy of women compared with men.¹⁷

Long-term care residents' ability to vote is sometimes questioned,¹⁸ and their votes challenged by political candidates seeking to change election results.¹⁹ Although concerns about cognitively impaired residents being improperly influenced are voiced from time to time, there is no evidence of systematic fraud occurring in long-term care.²⁰

As an initial matter, there is a growing consensus among scholars and policymakers that a person has the cognitive capacity to vote so long as they can somehow express a voting choice,²¹ meaning residents with either moderate or

¹⁴ CHRISTINE CAFFREY, MANISHA SENGUPTA & AMANUEL MELEKIN, U.S. DEP'T OF HEALTH & HUM. SERVS., RESIDENTIAL CARE COMMUNITY RESIDENT CHARACTERISTICS: UNITED STATES, 2018, NCHS DATA BRIEF, NO. 404, at 3 (2021) (finding sixty-one percent of residential care residents in United States required such assistance).

¹⁵ *Id.* at 2 (reporting fifty-five percent of residents are eighty-five years of age or older).

¹⁶ *Id.* at 1 fig.1 (reporting sixty-seven percent of residents are female).

¹⁷ NAT'L CTR. FOR HEALTH STAT., CTRS. FOR DISEASE CONTROL & PREVENTION, NCHS FACT SHEET 2 (2021) (estimating women's life expectancy was 81.4 years and men's life expectancy was 76.3 years as of 2019).

¹⁸ See, e.g., Karlawish et al., *Addressing*, *supra* note 9, at 1345, 1349 (treating voting by nursing home residents with suspicion and suggesting nursing home residents be screened for capacity to vote).

¹⁹ See Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065, 1077-79 (2007) [hereinafter Kohn, *Preserving Voting Rights*] (discussing instances where nursing home residents' voting rights are called into question and documenting instances of losing political candidates trying to disqualify nursing home ballots).

²⁰ See *id.* at 1076-77 (describing evidence as "minimal" and "largely anecdotal" because no "systemic studies" have been completed). Incidents of voter fraud are generally isolated in nature, and some claims of fraud stem from misunderstandings about the voting competency of residents and their right to vote via normal absentee ballot processes. For example, recent allegations of long-term care facility fraud in Racine County, Wisconsin, appear to reflect such misunderstandings. See Marisa Wojcik, *Noon Wednesday: The Competency of Voters in Nursing Homes*, PBS WIS.: NEWS (Nov. 3, 2021), <https://pbswisconsin.org/news-item/noon-wednesday-the-competency-of-voters-in-nursing-homes> [<https://perma.cc/WS37-M67Z>] (explaining voting in long-term care facilities outside of Special Voting Deputy process did not amount to voter fraud, nor was there evidence of widespread coercion, as had been alleged).

²¹ This standard was recommended by experts convened by the University of the Pacific, McGeorge School of Law, the Borchard Foundation Center on Law and Aging, and the American Bar Association Commission on Law and Aging for a 2006 symposium entitled "Facilitating Voting as People Age: Implications of Cognitive Impairment." See Charles P. Sabatino & Edward D. Spurgeon, *Introduction*, 38 MCGEORGE L. REV. 843, 853 (2006) (describing symposium and listing entities involved). See generally *Recommendations of the Symposium*, 38 MCGEORGE L. REV. 861 (2007) (setting forth symposium recommendations). It was subsequently adopted by the American Bar Association as part of its policy on voting

severe cognitive disabilities can often meet this standard. Further, contrary to common assumptions, most long-term care residents do not have substantial cognitive disabilities. Only slightly more than one third of nursing home residents have severe cognitive impairment, and thirty-nine percent—or over half a million residents—have no or only mild cognitive impairment.²² Severe cognitive impairment is even less common among residents of assisted living facilities.²³ Thus, these data suggest that most long-term care residents retain the cognitive ability to make and express voting choices if given the opportunity.

Moreover, even if a state were to limit the right to vote to persons who can make informed choices and understand the nature and consequences of the voting process—which America’s woeful history with poll tests as a tool for disenfranchisement suggests is the wrong approach²⁴—most long-term care residents would likely satisfy that standard because the majority have either no cognitive impairment or only mild cognitive impairment.

Long-term care residents not only remain mostly able to vote; as a population, they remain especially interested in doing so.²⁵ This interest is consistent with the fact that older age is a predictor of voting. As noted earlier, in the 2020 presidential election, adults over the age of sixty-five voted at rates that

rights. See ABA Comm’n on L. & Aging, Resol. 121 (2007) (confirming in attached report introduction that the resolution was based on symposium recommendations). More recently, it was recommended by the Uniform Law Commission as the appropriate standard for courts to use when determining whether an individual lacks capacity to vote. See UNIF. GUARDIANSHIP, CONSERVATORSHIP & OTHER PROTECTIVE ARRANGEMENTS ACT § 310 (UNIF. L. COMM’N 2017) (noting in comment that provisions relating to removal of voting rights were informed by McGeorge symposium recommendations).

²² These numbers are based on 2014 data, the most recent available to the authors. See CTRS. FOR MEDICARE & MEDICAID SERVS., NURSING HOME DATA COMPENDIUM 2015 EDITION 159 fig.3.11 (2015) (noting that, as of 2014, 36.6% of residents had severe cognitive impairment, 24.8% had moderate cognitive impairment, and 38.7% had no cognitive impairment or only mild cognitive impairment).

²³ See Sheryl Zimmerman, Philip D. Sloane & David Reed, *Dementia Prevalence and Care in Assisted Living*, 33 HEALTH AFFS. 658, 661 (2014) (stating nineteen percent of residents of assisted living facilities have severe impairment); see also MANISHA SENGUPTA & CHRISTINE CAFFREY, U.S. DEP’T OF HEALTH & HUM. SERVS., CHARACTERISTICS OF RESIDENTIAL CARE COMMUNITIES BY PERCENTAGE OF RESIDENT POPULATION DIAGNOSED WITH DEMENTIA: UNITED STATES, 2016, NAT’L HEALTH STATS. REP. NO. 148, at 1 (2020), <https://www.cdc.gov/nchs/data/nhsr/nhsr148-508.pdf> [<https://perma.cc/H4MB-44ZM>] (reporting approximately fifty-eight percent of assisted living facility residents had not been diagnosed with any form of dementia as of 2016).

²⁴ See, e.g., Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 616-25 (2004) (describing how states used literacy tests to disenfranchise Black voters from Reconstruction era until the VRA prohibited such tests).

²⁵ See Kohn, *Preserving Voting Rights*, *supra* note 19, at 1072 (discussing nursing home residents’ interest in voting).

exceeded any other age group.²⁶ In congressional elections, voting rates of those sixty-five years and older have far exceeded any other age group in every election since 1986—recently exceeding all other age groups by nearly ten percentage points.²⁷

Indeed, our review of nursing home inspection reports found new evidence of residents' enthusiasm for voting—and the importance they place on it.²⁸ Inspectors repeatedly documented residents explaining that voting forms a part of their identity, expressing that they vote in every election, and describing the inability to vote as highly distressing.²⁹ For example, an inspector reporting on an interview with a Colorado nursing home resident surveyed in 2018 stated:

She said [she] had not realized it was time for the election until she turned on the television and watched the results. She said she was very upset she was not given the opportunity to vote. She said this was the first year, since the age of 18, she had not participated in an election.³⁰

Similarly explaining what it felt like not to be able to vote, a Chicago, Illinois, resident said, “I feel miserable, I always vote and I missed an opportunity to be a part of history.”³¹

Inspection reports also show that residents may feel infantilized³² and disrespected³³ when they are not able to exercise their right to vote. This can be

²⁶ See *Voting and Registration in the Election of November 2020*, *supra* note 1 (documenting that those over sixty-five were the only age group to vote at rates exceeding seventy percent).

²⁷ *Historical Reported Voting Rates*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html> (last updated Oct. 26, 2021) (listing congressional election voting rates by year and voter age group, race, sex, and geographic region).

²⁸ See *infra* Part II.

²⁹ See *infra* Section II.A.

³⁰ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR REHABILITATION CENTER AT SANDALWOOD, WHEAT RIDGE, COLO. 2 (2018) (on file with author).

³¹ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR PRINCETON REHAB & HCC, CHL, ILL. 2 (2019) (on file with author) (documenting another resident in the facility saying, “I wanted to vote period, I always vote and I should have had a chance to do just that”); see also CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR AMAYA SPRINGS HEALTH CARE CENTER, SPRING VALLEY, CAL. 1 (2020) (documenting resident stating, “I feel very strongly to vote! I need to vote!”).

³² See CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR LIFE CARE CENTER OF PLAINWELL, PLAINWELL, MICH. 1 (2019) [hereinafter PLAINWELL STATEMENT] (on file with author) (noting resident complained that facility's failure to support her voting rights made the resident feel like she wasn't being treated “like an adult”).

³³ See CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR REHABILITATION CENTER AT

highly upsetting to them. As one resident explained to an inspector, “I didn’t realize once you come into a facility, your voting rights could be taken away from you . . . my vote may not have made a difference but dear GOD give me the opportunity to vote; that should have been my decision and not the facilities [sic].”³⁴

II. THE SYSTEMATIC DISENFRANCHISEMENT OF LONG-TERM CARE RESIDENTS

As discussed in Part I, many—perhaps the majority—of the approximately 2.2 million Americans living in long-term care facilities in the United States would vote if voting were made accessible to them. Yet, as this Part explains, residents face substantial barriers to exercising their right to vote. Some of these barriers are generally applicable rules and procedures that make it especially difficult for long-term care residents to vote. Others, however, are affirmatively created by state actors or facility staff and specifically target long-term care residents.

A. Facility-Created Barriers to Resident Voting

Although they largely meet the legal standard for cognitive voting capacity, the institutional setting in which residents live may prevent them from exercising their right to vote. Many residents have physical disabilities that preclude them from getting to the polls, obtaining mail-in ballots, or completing ballots without assistance, and facilities often fail to provide, or only inconsistently provide, the necessary assistance.³⁵ Further, facilities themselves sometimes erect new barriers, imposing their own screening and capacity tests.³⁶

To better understand the barriers that long-term care residents face in exercising their right to vote, we reviewed nursing home inspection reports from 2016 through 2021.³⁷ Nursing homes that accept either Medicare or Medicaid—which virtually all U.S. nursing homes do—are subject to regular inspections by state agencies. These agencies check for compliance with, among other things,

SANDALWOOD, WHEAT RIDGE, COLO. 1 (2018) (on file with author) (reporting that one resident asked staff to participate in state primary election and was told facility had run out of ballots and had no transportation services, and that the resident said he was upset because “it was his right, as an American citizen, to participate in the election”).

³⁴ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR SEASIDE HHC. AT ATLANTIC SHORE, VA. BEACH, VA. 1 (2017) (on file with author).

³⁵ See *infra* Section III.A.

³⁶ See Kohn, *Preserving Voting Rights*, *supra* note 19, at 1066-67 (describing how institutional setting of nursing homes makes it harder for residents to vote).

³⁷ Specifically, we searched ProPublica’s database of nursing home inspections for the terms “vote” and “voting” and read reports using these keywords to identify voting rights-related violations.

the resident rights provisions of the NHRA.³⁸ The NHRA requires facilities to assist residents with exercising their rights to vote.³⁹ By looking at citations that facilities receive for failing to assist residents with voting, we were able to identify the barriers that nursing home residents who wish to vote face and the impacts these barriers have on their well-being.

We identified more than one hundred documented instances of nursing homes violating residents' voting rights.⁴⁰ Most likely, this was a very small minority of the actual violations that occurred. Our review of the reports suggests that, at least before October 2020 when the federal Department of Health and Human Services issued guidance to facilities underscoring the need to support voting rights,⁴¹ surveyors did not actively look for voting rights violations. Rather, the narratives inspectors offered strongly suggest that inspectors typically only discover voting rights violations when the violations were spontaneously mentioned by residents who were asked open-ended questions about their general concerns. As such, these reports do not give complete information about the voting experiences of residents.

The reports also provide an incomplete picture of the harms associated with the disenfranchisement of nursing home residents because they omit identifying information about residents. The result is that it is not possible to determine whether residents with certain demographic characteristics are more likely to be disenfranchised than others. For example, the reports do not indicate the race of residents facing barriers to voting, thus limiting our ability to draw empirical conclusions about the racial justice implications of such violations.

Nevertheless, the inspection reports are a uniquely valuable source of data because they are one of the only available sources documenting residents' voting barriers: there is no wide-scale data-gathering about voting in facilities, thus limiting the possibility of making statistical claims comparing voter registration or turnout of residents to nonresidents.⁴²

³⁸ See 42 C.F.R. § 483.10(b) (2023) ("The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States."); *id.* § 483.10(b)(1) (mandating that nursing homes "ensure that the resident can exercise his or her rights without interference, coercion, discrimination, or reprisal from the facility").

³⁹ See *infra* Section III.A.

⁴⁰ We pulled these violations from ProPublica's nursing home inspection report database. Some of the inspection reports showing voting-related violations have since been removed from the database. For a discussion of how provider challenges can lead to nursing home inspection reports being pulled from the public domain, see Robert Gebeloff, Katie Thomas & Jessica Silver-Greenberg, *How Nursing Homes' Worst Offenses Are Hidden from the Public*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/09/business/nursing-home-abuse-inspection.html>.

⁴¹ See generally CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., MEMORANDUM: COMPLIANCE WITH RESIDENTS' RIGHTS REQUIREMENT RELATED TO NURSING HOME RESIDENTS' RIGHT TO VOTE (2020) [hereinafter NURSING HOME RESIDENTS' RIGHT TO VOTE MEMORANDUM].

⁴² Letter from Alie Bornstein, Lindsay Dreyer, Susan Mizner, Casey Smith, Ihaab Syed & Samantha Westrum, Am. C.L. Union, to Nat'l Inst. of Standards and Tech., Dep't of Com.

1. Failure To Assist

Inspection reports suggest that residents' lack of information about how and when they might exercise their voting rights is likely the single greatest barrier to them being able to exercise their right to vote. We found that a common theme among the voting-related violations was that residents were not informed of an election in which they otherwise would have voted or told how they could obtain a ballot to vote in that election.⁴³

Residents may also not understand that they have a right to vote or that they have a right to be assisted in exercising their voting rights. At times, this may be due to staff providing misinformation about residents' voting rights. For example, resident council members at a North Carolina nursing home were instructed that assistance with voting and transportation to the polls "was the responsibility of the family members of the residents."⁴⁴ This misinformation was not corrected even when a resident explained to staff that she "did not feel it was fair that people who did not have involved family members to assist with the voting process were unable to exercise their right to vote."⁴⁵

Information and assistance are especially unlikely to be available to nonambulatory residents. For example, an inspector found that residents in a Kentucky nursing home who wished to vote were unaware that they could. The facility's "Life Enrichment Director" (who was the staff person tasked with providing residents with election-related support)⁴⁶ had limited that support to posting absentee ballot applications on a bulletin board outside the Life

(July 16, 2021), <https://www.regulations.gov/comment/NIST-2021-0003-0146> [<https://perma.cc/8225-P4AQ>].

⁴³ See, e.g., CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR DIVERSICARE OF HAYSVILLE, HAYSVILLE, KAN. 1 (2018) [hereinafter HAYSVILLE STATEMENT] (on file with author) (reporting interviews with four residents who stated that they would have liked to vote in previous day's election, but who were not able to do so because person in charge of assisting them was not "aware" in time); CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR POMEROY LIVING ROCHESTER SKILLED REHABILITATION, ROCHESTER HILLS, MICH. 1 (2018) [hereinafter ROCHESTER HILLS STATEMENT] (on file with author) (quoting resident explaining to surveyor when asked if they were able to vote in primary election earlier in month, "I did not vote, I wish I could have. I'm not even sure how I would vote"); CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR TUDOR OAKS HEALTH CENTER, MUSKEGO, WIS. 1 (2020) (on file with author) (reporting that inspector interviewed residents who indicated they were interested in voting, had not done so in a recent election, and "denied knowing how they could register to vote or obtain absentee ballots while being residents of the facility" and reporting that facility did not provide residents with information about how to get assistance with voting).

⁴⁴ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR RIDGEWOOD LIVING & REHAB CENTER, WASHINGTON, N.C. 13 (2019) (on file with author).

⁴⁵ *Id.*

⁴⁶ Our review of inspection reports suggests that activities directors are frequently assigned responsibility within the facility for voting-related activities.

Enrichment Office. In that location, nonambulatory residents had no hope of seeing them. The Life Enrichment Director took the position that “if a resident was not ambulatory, the resident’s family member had to request the application.”⁴⁷

Assistance with completing and returning ballots also appears to be less available to residents with certain types of disabilities. For example, a survey of a Virginia nursing home found that the facility provided trips to polling stations to “residents who were able to travel on the van” in the 2020 presidential election but did not help obtain absentee ballots for bedridden and nonambulatory residents living at the facility.⁴⁸

Another barrier to resident voting is that facilities may simply refuse to provide any residents with transportation to the polls. Sometimes it is simply a policy that transportation will not be provided. Rather, residents must rely on family or friends to bring them to the polls.⁴⁹ At a New Mexico nursing home, one individual reported that residents were “allowed to go vote but they had to find their own ride”—a description the facility’s social service director did not dispute despite acknowledging that she was aware that residents wanted transportation to the voting site.⁵⁰ Other times, rides are not provided because other uses for transportation take priority. For example, a Kansas nursing home resident was unable to vote because, although the resident had requested a ride to the polls in a national mid-term election and had been assured that the facility would provide one, the van was not available because it was transporting another resident to an out-of-town hospital.⁵¹ Similarly, a resident of a Michigan nursing home reported that she “asked multiple staff . . . how to arrange to vote” and was

⁴⁷ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR WESTPORT PLACE HEALTH CAMPUS, KY. 1 (2016) (on file with author).

⁴⁸ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR CONSULATE HEALTHCARE OF WILLIAMSBURG, WILLIAMSBURG, VA. 1 (2020) [hereinafter WILLIAMSBURG STATEMENT] (on file with author).

⁴⁹ *See, e.g.*, CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR ST. THOMAS POST ACUTE AND REHABILITATION CENTER, BERWICK, PA. 1 (2020) (on file with author) (finding that the only residents who exercised their right to vote in the 2020 presidential election were able to do so because their family came and took them to polls).

⁵⁰ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR LAGUNA RAINBOW NURSING CENTER CASA BLANCA, N.M. 1 (2018) (on file with author).

⁵¹ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR LIFE CARE CENTER OF OSAWATOMIE, OSAWATOMIE, KAN. 1 (2018) (on file with author); *see* CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR WEST COUNTY CARE CENTER, BALLWIN, MO. 1 (2018) (on file with author) (noting residents were unable to go to the polls because facility van broke down on election day and facility made no attempt to find alternative transportation).

told she had to “arrange her own transportation.”⁵² The resident “then waited until election time got closer and when she didn’t hear anything she again asked multiple staff . . . but was again told she would have to find her own way but by then it was too late.”⁵³ The surveyor reported that the resident was “very upset about this because she votes every year . . . [and] indicated she didn’t feel like she was treated like an adult.”⁵⁴

Reliance on family and friends to provide access became an even more formidable barrier amid COVID-19. In response to the emergence of the COVID-19 pandemic, long-term care facilities closed their doors to visitors, thus preventing residents’ families and friends from providing in-person voting-related assistance to residents.⁵⁵ While much has changed since the pandemic began, many restrictions on visitors persisted into 2022⁵⁶ and thus posed a barrier to election assistance during two national election cycles.

While these barriers undermine residents’ abilities to exercise their voting rights in a wide variety of types of elections, our review suggests that nursing home residents are especially likely not to be afforded the opportunity to vote in nonpresidential elections. When questioned about why residents were not offered the opportunity to vote in recent elections, some staff responded that they did not know that residents needed to be able to vote in nonpresidential elections or simply that they did not offer voting in nonpresidential elections.⁵⁷ At times, this appears to result from facility staff themselves being unaware of less prominent elections.⁵⁸ However, some facilities apparently chose not to

⁵² PLAINWELL STATEMENT, *supra* note 32, at 3.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Nina A. Kohn, *Coronavirus Isolated Nursing Home Residents. Now It May Keep Them from Voting.*, WASH. POST (Oct. 14, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/10/14/nursing-homes-voting-covid-discrimination/> (discussing how COVID-19 visitor restrictions impact long-term care residents’ voting rights).

⁵⁶ See Andy Markowitz & Emily Paulin, *AARP Answers: Nursing Homes and the Coronavirus*, AARP: FAM. CAREGIVING (Mar. 16, 2022), <https://www.aarp.org/caregiving/health/info-2020/nursing-homes-coronavirus-faqs.html> [<https://perma.cc/HGP9-VCT5>] (showing restrictions on nursing home visitation due to COVID-19 as of 2022).

⁵⁷ See, e.g., CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR SENECA HEALTH & REHAB, SENECA, S.C. 1-2 (2018) (on file with author) (noting staff responded to surveyor’s concern that residents were unable to vote in state and local elections by explaining that residents get opportunity to vote in presidential elections); CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR HERITAGE HEALTHCARE OF PICKENS, SIX MILE, S.C. 1 (2018) (on file with author) (reporting on an activities director in South Carolina facility who stated they were “not aware that residents had to vote in the local and/or state elections” and that “residents generally are given the opportunity to vote in presidential elections”).

⁵⁸ For example, an activities director in a Kansas facility reported that no residents were given the opportunity to vote in a state-wide election that was held in August because she was unaware of the election, but the director also reported that she planned to assist with a November general election. HAYSVILLE STATEMENT, *supra* note 43, at 1.

provide assistance in elections they consider less important. For example, when asked why none of the facility's registered voters participated in a certain state-wide election, the social services director of a nursing facility in Florence, Alabama, "stated we normally only participate in the presidential election."⁵⁹

Underlying at least some of these violations appears to be a failure to appreciate the importance of residents' voting rights or to prioritize assistance with voting. A frequent refrain in the inspection reports reviewed was that a resident made their request "too late" either to vote or to receive voting assistance, even though the election was days or even weeks away.⁶⁰ For example, the day before the 2020 presidential election, a newly admitted resident explained to a surveyor that "his only concern was that he could not vote the next day."⁶¹ The resident reported that a staff member had told him that he could not vote, which was not true—as evidenced by the fact that the surveyor was able to prompt the home's activities director to obtain a ballot for the resident.⁶² Similarly, a director of nursing at a California nursing home told an inspector, six days before the upcoming November 2018 election, that it was simply "too late for this election" to give residents the opportunity to vote.⁶³

The conclusion that residents were "too late" appeared to be frequently based on the resident being too late to comply with the facility's preferred method of resident voting, as opposed to being too late to meet state-mandated requirements for participation. For example, an activities director at a Michigan nursing home reported to the surveyor that a resident was not able to vote because the resident "came to me and told me they wanted to vote," but "[i]t was a week before the election, so it was too late to do an absentee ballot."⁶⁴ No explanation was provided as to why the resident could not be assisted with voting in person.⁶⁵ Similarly, a resident at an Indiana nursing home reported being denied the ability to vote in two different elections because the resident was in treatment during the particular hours that staff was willing to assist with registration.⁶⁶

⁵⁹ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR EL REPOSO NURSING FACILITY, FLORENCE, ALA. 2 (2018) (on file with author).

⁶⁰ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR SOLARIS HEALTHCARE PARKWAY, STUART, FLA. 1 (2020) (on file with author).

⁶¹ *Id.*

⁶² *See id.* ("A follow up interview with Activities Director on 11/02/20 at 2:39 PM revealed she was able to obtain a ballot for Resident #370.").

⁶³ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR SPRING HILL MANOR, GRASS VALLEY, CAL. 2 (2018) (on file with author).

⁶⁴ ROCHESTER HILLS STATEMENT, *supra* note 43, at 1.

⁶⁵ *See id.*

⁶⁶ *See* CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR DIVERSICARE OF PROVIDENCE,

Notably, our review of inspection reports suggests that it is not only facilities that deprioritize long-term care residents' voting rights. The way inspection reports characterize voting-related violations also minimizes them. Not one of the more than one hundred violations that were uncovered categorized a voting-related violation as causing more than "minimal harm."⁶⁷ Rather, all characterized the harm suffered by residents as a result of being unable to exercise their voting rights as causing either "minimal" or "potential for minimal" harm.⁶⁸ Likewise, even where a facility's violations affected all of its residents, the breadth of the violation was characterized as merely affecting either a "few" residents or "some" residents.⁶⁹

2. Screening

In addition to not assisting residents with voting, facilities themselves may affirmatively create additional barriers to resident voting by acting as gatekeepers and limiting residents' access to information about voting, voting materials, and voting assistance.

Surveys of long-term care facilities in Pennsylvania and Virginia in the early 2000s indicated that, at least in these regions, many long-term care facilities engaged in practices that screened residents for capacity to vote to determine who should be permitted to vote or be assisted with voting.⁷⁰ For example, a

NEW ALBANY, IND. 13 (2019) (on file with author) ("In an interview . . . the resident indicated: It has happened twice now that I didn't get registered to vote so I could go ahead and vote in the elections. Back in November, I wanted to get registered but by the time I got back from [medical treatment] at a little after 11 am, they told me it was too late and I could do it next time. Well, it happened again this past week I was at [medical treatment] and when I came back they told me it was too late.").

⁶⁷ See, e.g., *id.* (classifying incident where resident was unable to vote because he was receiving medical treatment during staff assistance hours as being "minimal harm or potential for actual harm").

⁶⁸ See *supra* Section II.A.

⁶⁹ See, e.g., CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR LAHSER HILLS CARE CENTRE, SOUTHFIELD, MICH. 1 (2020) (on file with author) (noting facility that did not ask any of its residents whether they wanted to vote was found to have only affected "some" residents' rights, even though ten out of ten residents asked reported that they would have voted in a recent election if offered opportunity); CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR WESLEY ENHANCED LIVING AT STAPELEY, PHILA., PA. 2-3 (2018) (on file with author) (reporting facility had no policy to provide any of its residents with ballots, but violation was classified as only affecting some residents).

⁷⁰ See, e.g., Jason H.T. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, Rosalie A. Kane, Constantine G. Lyketsos, Pamela S. Karlan, Bryan D. James, Charles Sabatino, Thomas Lawrence & David Knopman, *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL'Y 65, 66 (2008) [hereinafter Karlawish et al., *Identifying*] (surveying long-term care facilities in Philadelphia area); Richard Bonnie et al., "How Does Voting Occur in Long-Term Care?" Interview Script and Responses (2005) (unpublished manuscript) (on file with author).

2005 study of Pennsylvania facilities found that nearly two-thirds “assessed” residents for the ability to vote,⁷¹ using techniques such as quizzing residents on election-related information or conducting a Folstein Mini-Mental State Examination (a simple, widely used instrument designed to screen for dementia).⁷² A small Virginia study conducted around the same time found that seven out of eight nursing homes and three out of eight assisted living facilities studied reported assessing residents for capacity to vote.⁷³

Such gatekeeping has been roundly critiqued and condemned, both because it fails to provide the due process safeguards necessary to protect residents’ fundamental constitutional right to vote and selectively disenfranchises and stigmatizes an already marginalized population.⁷⁴ Indeed, it was outright rejected by a nonpartisan group of legal experts convened specifically to consider whether to recommend it.⁷⁵ Nevertheless, the practice persists.

Our review of survey inspection reports from 2016 and beyond finds multiple instances of staff admitting to such practices. For example, a Pennsylvania nursing home staff member determined which residents at the facility would be assisted with voting “based on his determination of the Brief Interview for Mental Status (BIMS - a brief screening tool that aids in detecting cognitive impairment) score of the resident and his impression of their cognitive level and ability to understand the voting process.”⁷⁶ Similarly, an Alabama facility reported that it offered assistance with transportation or absentee ballots by asking “cognitive residents” if they wanted to vote (although further inquiries showed this category did not include all residents who wanted to vote and who had what the surveyor termed “intact cognition”).⁷⁷

Another form of such screening we identified was nursing homes treating individuals who were subject to guardianship as unable to vote, although imposition of guardianship need not result in the loss of voting rights. For example, a Virginia facility indicated to surveyors that thirty-nine of their

⁷¹ See Karlawish et al., *Identifying*, *supra* note 70, at 66.

⁷² See *id.* at 72 (explaining how some facility staff measuring voting capability used “election-related questions” to test “residents’ knowledge about current political figures” while other facility staff used “cognitive assessments” and “relied on the mini-mental state exam”).

⁷³ See Bonnie et al., *supra* note 70, at 13.

⁷⁴ See, e.g., Kohn, *Preserving Voting Rights*, *supra* note 19, at 1099 (arguing informal screening violations invite fraud, stigmatize residents, and violate constitutional due process requirements).

⁷⁵ See *id.* (“If voting by incapacitated persons is truly a concern, systems that provide adequate notice and pre-deprivation hearing rights to all persons who allegedly lack voting capacity—not just those in institutional settings—could be adopted.”).

⁷⁶ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR UNIVERSITY CITY REHABILITATION AND HEALTHCARE CENTER, PHILA., PA. 1 (2019) (on file with author).

⁷⁷ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR FLORALA HEALTH AND REHABILITATION LLC, FLORALA, ALA. 2 (2018) (on file with author).

residents could not vote because they were subject to guardianship,⁷⁸ although a court in Virginia can impose a guardianship without removing the right to vote,⁷⁹ and there is some question as to whether it is constitutional to terminate voting rights based merely on imposition of guardianship.⁸⁰

B. Statutorily Created Barriers to Resident Voting

In addition to the practical barriers experienced by long-term care residents, state statutes and regulatory schemes governing voting create substantial barriers to residents exercising their fundamental right to vote. As detailed in this Section, some of these statutes are generally applicable laws that make it difficult for individuals with disabilities, including residents of long-term care institutions, to vote. Others, however, are statutory provisions that specifically limit the ability of residents of long-term care facilities to receive needed assistance in obtaining, completing, and returning their ballots.

1. Barriers Created by Generally Applicable Voting Laws

Nursing home residents' difficulty voting is exacerbated by policies that increase the procedural complexity of voting. Overall, the higher the procedural hurdles are for would-be voters to jump over, the less likely nursing home residents will clear them.⁸¹ Voter identification laws, proof requirements for obtaining a mail-in ballot, and burdensome witnessing or notarization

⁷⁸ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR CONSULATE CARE OF NORFOLK, NORFOLK, VA. 2 (2017) (on file with author); see CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR APPLE RIDGE CARE CENTER, WAVERLY, MO. 1 (2019) (on file with author) (noting residents subject to guardianship may be assumed incapable of voting, and thus not offered the opportunity to vote).

⁷⁹ See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity To Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 978 app. A (2007) (explaining that, in Virginia, "[g]uardianship courts may enter a specific order allowing the right to vote").

⁸⁰ See *Doe v. Rowe*, 156 F. Supp. 2d 35, 47-51 (D. Me. 2001) (holding that individuals under guardianship by reason of mental illness must be granted notice and opportunity to be heard before losing right to vote, and imposition of guardianship order could not suffice to remove the right to vote if, in context of that proceeding, individual did not have notice and opportunity to be heard about loss of voting rights specifically).

⁸¹ See generally Nina A. Kohn, *Voting and Political Participation*, in *THE LAW AND ETHICS OF DEMENTIA* 483 (Charles Foster, Jonathan Herring & Israel Doron eds., 2014) [hereinafter Kohn, *Voting and Political Participation*] (exploring how procedural complexity creates barriers to voting for people with mild and moderate dementia); Nina A. Kohn, *Cognitive Impairment and the Right To Vote: Rethinking the Meaning of Accessible Elections*, 1 CAN. J. ELDER L. 29 (2008) [hereinafter Kohn, *Cognitive Impairment*] (describing how complexity of voting procedures may make voting inaccessible to persons who otherwise have the capacity to vote).

requirements mean that nursing home residents need greater help to vote—and are more likely to be unable to vote when that help is not forthcoming.

Nursing home inspection reports show concrete examples of how policies that increase the formalities associated with obtaining an absentee ballot reduce the likelihood that residents will be able to obtain one. For example, nine out of thirteen residents in a Bera, Kentucky nursing home who requested to vote by absentee ballot in a November 2018 election were unable to do so because the facility's activities director failed to timely comply with the cumbersome requirements provided by the County Court Clerk's Office.⁸² The complexity of the requirements and the lack of clear communication with the facility help explain this failure. According to the activities director:

The Clerk's Office told her that she needed to fax the name, room number, and Social Security number for each resident requesting an absentee ballot for voting. . . . [S]he sent in the requested information and the Clerk's Office contacted her back stating that each of the requests had to be signed by the resident and received at the Clerk's Office by 10/30/18. The Activity Director stated she got the requests signed by the residents and placed in the mail on 10/25/18. However, the Activity Director stated she called the Clerk's Office on 10/30/18 and was told the applications had not been received and that they had missed the timeframe for submission. The only solution available was that residents could still vote via absentee ballot, but they would have to physically come to the Clerk's Office to vote on 11/05/18. The Activity Director stated transportation to the Clerk's Office was arranged for 11/05/18; however, only four (4) residents were able to physically go to vote on 11/05/18⁸³

Similarly, voter identification laws that require current official identification pose a substantial barrier to voting.⁸⁴ Obtaining voter identification can be an insurmountable barrier for residents. Consider the lengths that a resident of a Baton Rouge, Louisiana, nursing home went to in her attempt to vote.⁸⁵ For months, she sought, with help from siblings, to fulfill the requirements to vote in the 2020 presidential election. Unfortunately, her identification was not current.⁸⁶ She was willing to leave the facility to obtain a new identification card from the relevant Department of Motor Vehicles, even though she was warned

⁸² See CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH AND HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR BERA HEALTH AND REHABILITATION, BERA, KY. 1 (2020) (on file with author).

⁸³ *Id.*

⁸⁴ See, e.g., CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR THE CHATEAU AT MOUNTAIN CREST, CINCINNATI, OHIO 1 (2018) (on file with author) (reporting two residents were unable to vote because of expired identification cards).

⁸⁵ See CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR CENTER POINT HEALTH CARE AND REHAB, BATON ROUGE, LA. 1-4 (2020) (on file with author).

⁸⁶ See *id.* at 2.

she would be quarantined afterward. Nevertheless, she was not permitted to do so. The facility's corporate office refused to allow her to leave the facility to obtain the identification needed to vote on the grounds that the "outing" was not medically necessary.⁸⁷

Of course, long-term care residents are not the only individuals with disabilities who can be effectively disenfranchised by procedural hurdles. Indeed, the procedural barriers to registration and casting ballots that long-term care residents encounter can be seen as more extreme versions of the barriers that are experienced by individuals with disabilities who live in community-based settings.

Researchers have long documented how voter registration requirements can pose substantial barriers to voting for community-dwelling individuals with disabilities. For example, many states offer registration forms that fail to meet accessibility standards, because they rely upon technical, complex language that poses barriers for those with cognitive disabilities, irrespective of their location.⁸⁸ Similarly, states often require voters to return registration forms by mail or in person at local government offices, both of which can pose accessibility barriers, especially for those without reliable accessible transportation or without someone to assist them with completing the forms.⁸⁹ Consistent with these barriers, Census data reveals that people with disabilities related to self-care or independent living difficulties are more than ten percent less likely than the rest of the population to be registered to vote (a statistic that likely underestimates the scope of the gap, as it excludes institutionalized individuals, such as residents of nursing homes).⁹⁰

The complexity of these voter registration procedures can be particularly problematic for long-term care residents.⁹¹ When they move into long-term care facilities, residents change their addresses and may no longer be eligible to vote where registered.⁹² They may not realize they need to register in the new location. And with reduced access to friends, family, and outside information,⁹³

⁸⁷ See *id.* at 3. We do not mean to suggest that the facility had the legal authority to prohibit the resident from leaving the facility. However, the report suggests that the resident believed so and that the inspector may have too.

⁸⁸ See Danielle Root & Mia Ives-Rublee, *Enhancing Accessibility in U.S. Elections*, CTR. FOR AM. PROGRESS (July 8, 2021), <https://www.americanprogress.org/issues/democracy/reports/2021/07/08/501364/enhancing-accessibility-u-s-elections> [https://perma.cc/8F53-LD3G].

⁸⁹ See *id.*

⁹⁰ See *Voting and Registration in the Election of November 2020*, *supra* note 1.

⁹¹ See, e.g., CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION FOR CULLMAN HEALTH CARE CENTER, CULLMAN, ALA. 2 (2018) (on file with author) (describing how resident who wished to vote in special election for U.S. Senator could not because resident was registered in wrong county and facility did not timely complete change of address paperwork).

⁹² See Belt, *Contemporary Voting*, *supra* note 6, at 1510.

⁹³ Cynthia L. Port, Ann L. Gruber-Baldini, Lynda Burton, Mona Baumgarten, J. Richard Hebel, Sheryl Itkin Zimmerman & Jay Magaziner, *Resident Contact with Family and Friends*

they may not receive the information they need about relevant deadlines. Thus, it is likely that the registration gap among people with self-care and independent living disabilities, described above, is even more pronounced for those who live in institutional settings (though data on the topic is unavailable).

Although nursing home voting programs provide one avenue for residents to vote in most states, some residents may not have access to those programs and many still seek to vote through the typical means used by the rest of the population—polling places or mail-in ballots.⁹⁴ When they do so, they are likely to face substantial accessibility barriers—barriers that impact both residents and community-dwelling individuals with disabilities. Scholars and advocates have long shown that individuals with disabilities, including those with mobility-related impairments, can face substantial difficulty physically accessing polling places or mail-in ballots, such as trouble obtaining transportation to the polls, navigating polling places (for example, waiting in line) once they arrive, or using the polling equipment provided.⁹⁵ Likewise, people with visual disabilities may need assistance with completing a ballot, regardless of their institutional status.⁹⁶ Some voters may need accessible technology at the polling place, which states often fail to provide.⁹⁷ Furthermore, there is ample documentation that proof of identification requirements for obtaining a mail-in ballot, and burdensome witness or notarization requirements, mean that voters with disabilities—again, regardless of their housing situation—need assistance to meet those requirements,⁹⁸ and such assistance is frequently not available. Institutional status may exacerbate these accessibility barriers: for example, residents may not have contact with friends or family who could otherwise assist them or serve as a witness, may not have reliable access to mail to submit witness signatures and attestations, and may need transportation which (as discussed above) facilities do not reliably provide.

Notably, these barriers are increasing. In the name of combatting (largely nonexistent) voter fraud, many states have recently passed legislation that further increases the procedural complexity of voting.⁹⁹ These new, more

Following Nursing Home Admission, 41 GERONTOLOGIST 589, 592 (2001) (showing reduction in contact with family and friends among nursing home residents after placement).

⁹⁴ See *infra* Section III.E.

⁹⁵ Ihaab Syed, Michelle Bishop, Sarah Brannon, Erika Hudson & Kristen Lee, *Designing Accessible Elections: Recommendations from Disability Voting Rights Advocates*, 21 ELECTION L.J. 60, 61 (2022) [hereinafter Syed et al., *Designing Accessible*].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Kohn, *Cognitive Impairment*, *supra* note 81, at 41-44 (describing how complexity of voting procedures may make voting inaccessible to persons with capacity to make voting-related choices); Kohn, *Voting and Political Participation*, *supra* note 81, at 483-84 (exploring how procedural complexity creates barriers to voting for people with mild and moderate dementia).

⁹⁹ See *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/F8UX-FYX6>] (summarizing recently passed voting bills).

burdensome voting requirements tend to particularly impact voters with disabilities,¹⁰⁰ and perhaps especially those who are institutionalized.¹⁰¹ For example, a new wave of statutes that limit the number of ballots that can be returned by a single individual—cynically called “ballot harvesting” laws¹⁰²—may have a particularly negative impact on institutionalized voters because they may prevent nursing home staff from collecting multiple ballots within facilities and limit the assistance available to residents to return their ballots. These new statutes are especially problematic for residents of the many facilities without direct access to a post office box who cannot obtain or return a mail-in ballot without help.

2. Statutory Limitations on Assistance

Several state statutes purport to limit who may assist a long-term care resident with voting. For example, a North Carolina statute makes it a felony for nursing home staff to assist residents with voting; a federal court only recently decided the statute was not enforceable.¹⁰³ Similarly, a Louisiana statute prohibits nursing home staff from assisting residents who vote as part of the state’s supervised voting program in nursing facilities and also limits other staff of healthcare institutions from assisting voters at polling places or during early voting.¹⁰⁴

¹⁰⁰ See, e.g., Maggie Astor, *G.O.P. Bills Rattle Disabled Voters: ‘We Don’t Have a Voice Anymore,’* N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/14/us/politics/disability-voting-rights.html> (explaining how new wave of state voting legislation disproportionately restricts disability-related voting accommodations); Sarah Katz, *The Era of Easier Voting for Disabled People Is Over,* ATLANTIC (Aug. 25, 2021), <https://www.theatlantic.com/politics/archive/2021/08/people-disabilities-vote/619834/> (detailing over 400 new bills across forty-nine states that restrict voting access to those with physical disabilities).

¹⁰¹ Astor, *supra* note 100 (explaining how Wisconsin has proposed removing accommodations to voting requirements aimed at institutionalized voters).

¹⁰² Cf. Nancy Martorano Miller, Domingo Morel, Frank J. Gonzalez, Richard L. Hasen & Thessalia Merivaki, *Is Ballot Collection, or ‘Ballot Harvesting,’ Good for Democracy? We Asked 5 Experts,* CONVERSATION (Mar. 15, 2021, 8:58 AM), <https://theconversation.com/is-ballot-collection-or-ballot-harvesting-good-for-democracy-we-asked-5-experts-156549> [<https://perma.cc/8KKH-44SS>] (quoting Richard L. Hasen describing “ballot harvesting” as a pejorative term for vote collection efforts).

¹⁰³ North Carolina makes it a Class I felony for any “owner, manager, director, [or] employee” of a “hospital, clinic, nursing home, or rest home” to provide their patients or residents assistance with marking the ballot, signing an absentee ballot application, or requesting an absentee ballot. N.C. GEN. STAT. § 163-226.3 (2022). *But see infra* note 112 and accompanying text (discussing a district court decision enjoining enforcement of this statute).

¹⁰⁴ Louisiana provides that at least in the context of its nursing home voting program, “[t]he voter may receive assistance from any person selected by him, except [an employer or employer’s agent or union agent] and the owner, operator, or administrator of the nursing home or an employee of any of them.” LA. STAT. § 18:1333 (2023). State agency guidance also states that staff members of state-owned developmental centers may not assist in voting, at least at polling places on election day or during early voting. LA. SEC’Y OF STATE, GEAUX

State limitations on who may assist a long-term care resident in voting risk disenfranchising people who rely upon that assistance. The case of Walter Hutchins, a man living in a North Carolina nursing home who relied on assistance to vote due to his blindness, provides a stark example of how such laws risk disenfranchising residents. In 2020, due to the COVID-19 pandemic, Hutchins's nursing home was shut to outside visitors, so he could not receive help with voting from his wife¹⁰⁵ or voting assistance from the state's multi-partisan assistance program, which too had been suspended in response to the pandemic.¹⁰⁶ The result was that, in order to vote, Hutchins needed assistance from employees of his nursing home.¹⁰⁷ But under North Carolina law, for nursing home staff, providing assistance with absentee voting would constitute a felony.¹⁰⁸

Hutchins, with the assistance of a regional voting rights group, and as part of a broader challenge to the state's COVID-19 protocols for the November 2020 elections, sued the state in federal court, arguing that North Carolina's restriction on staff assistance violated Section 208 of the VRA.¹⁰⁹ The court intervened and granted a preliminary injunction permitting Hutchins's facility to assist him.¹¹⁰ At the time, the injunction extended only to Hutchins and did not yield a blanket ruling enjoining the statute for more residents.¹¹¹ In July 2022, however, a North Carolina district court enjoined the state from enforcing the statute on the grounds that it was preempted by Section 208.¹¹²

In addition, some states' long-term care voting protocols also effectively place barriers to voting by requiring residents to vote via supervised absentee voting programs, preventing them from voting in other ways. For example, a Tennessee statute creates a procedure for voting under the supervision of an Absentee Voting Deputy and mandates that for full-time facility residents, that

VOTE, LOUISIANA!: PROGRAMS FOR VOTERS WITH DISABILITIES, SENIOR CITIZENS, & NURSING HOME RESIDENTS 4 (2020), <https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/DisabledSeniorAndNursingHomeVoterInformation.pdf> [<https://perma.cc/S3S5-44Z3>].

¹⁰⁵ *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 191 (M.D.N.C. 2020); see Ryan McCarthy & Jack Gillum, *Hundreds of Thousands of Nursing Home Residents May Not Be Able To Vote in November Because of the Pandemic*, PROPUBLICA (Aug. 26, 2020, 5:00 AM), <https://www.propublica.org/article/hundreds-of-thousands-of-nursing-home-residents-may-not-be-able-to-vote-in-november-because-of-the-pandemic> [<https://perma.cc/JXT9-FGXJ>].

¹⁰⁶ McCarthy & Gillum, *supra* note 105.

¹⁰⁷ *Democracy N.C.*, 476 F. Supp. 3d at 232.

¹⁰⁸ N.C. GEN. STAT. § 163-226.3.

¹⁰⁹ *Democracy N.C.*, 476 F. Supp. 3d at 238.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See generally *Disability Rts. N.C. v. N.C. State Bd. of Elections*, No. 21-CV-361, 2022 WL 2678884 (E.D.N.C. July 11, 2022).

procedure is the only way to vote without going to a polling place in person.¹¹³ Even during the COVID-19 pandemic, when Voting Deputy visits were curtailed, the statute remained in force.¹¹⁴ Further, a Connecticut statute mandates a supervised absentee ballot program for voting in nursing homes, residential care facilities, and other institutional health settings.¹¹⁵ The statute has been interpreted to prohibit residents of nursing homes with twenty or more residents from voting in a different way or at a different time.¹¹⁶

While optional supervised absentee voting programs can have considerable benefits and provide necessary protections to voting in nursing homes, protocols such as these, which foreclose other modes of voting, create another obstacle to voting.¹¹⁷ For example, if residents are offered a date and time to vote under supervision of election officials, but cannot attend that date and time, they may be effectively barred from voting if unable to reschedule with elections officials. This is a substantial risk as residents often have little control over their own schedules, and thus might find themselves scheduled for therapy or treatment which they have limited ability to refuse. They may also be hospitalized or become unwell on the day the election officials come to the facility to supervise voting.

III. LEGAL PROTECTIONS FOR LONG-TERM CARE VOTERS

Despite the problems that long-term care residents face when seeking to vote, numerous federal and state statutes—at least on paper—provide protections for these voters. This Part outlines the nature and scope of existing protections. In doing so, it considers how the rights provided by existing law may be enforced.

We focus on statutes that could be employed to address barriers to voting that stem from institutionalization in a long-term care facility, including the failure

¹¹³ TENN. CODE ANN. § 2-6-601 (2023). By contrast, people over sixty years old are generally eligible to vote by mail in Tennessee. *Guide to Absentee Voting*, TENN. SEC'Y OF ST., <https://sos.tn.gov/elections/guides/guide-to-absentee-voting> [https://perma.cc/8YVM-27NA] (last visited Apr. 18, 2023). This law is apparently grounded in officials' perception that they might "lose . . . control" over ballots mailed to nursing homes. Chris Davis, *Nursing Home Staff Become Registered Poll Workers To Help Residents Vote*, NEWS CHANNEL 5 NASHVILLE (Oct. 21, 2020, 10:02 PM), <https://www.newschannel5.com/news/election/nursing-home-staff-become-registered-poll-workers-to-help-residents-vote> [https://perma.cc/5ZND-63CU] (quoting Tennessee Commissioner of Elections explaining that residents cannot vote absentee ballots via mail because "essentially you [don't] want to send a bunch of ballots to the nursing home and lose that control").

¹¹⁴ See TENN. CODE ANN. § 2-6-601.

¹¹⁵ CONN. GEN. STAT. § 9-159q (2023).

¹¹⁶ See MARY M. JANICKI, OFF. OF LEG. RSCH., CONN. GEN. ASSEMBLY, 98-R-0254, ABSENTEE VOTING IN NURSING HOMES AND HOSPITALS 2 (2003), <https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-0254.htm> [https://perma.cc/U3Q4-FXHQ] (interpreting Connecticut statute to say that "[w]hen 20 or more patients in an institution are registered voters, they must vote by absentee ballots under the supervision of the registrars of voters," who sets a time and place for voting).

¹¹⁷ See *infra* Section III.E.

of facilities to provide voting assistance, the related practice of gatekeeping residents' votes, state statutes that create barriers to voting assistance specific to long-term care voters, and the failure of states to provide registration assistance in public nursing homes and disability services agencies supporting residents.¹¹⁸ We argue that litigation under the NHRA, the VRA, the ADA, and the NVRA provides a pathway to challenge these barriers.

A. *Federal Nursing Home Reform Act*

The NHRA, originally adopted in 1987, requires nursing homes that accept Medicaid or Medicare to support residents in exercising their rights as citizens, including the right to vote.¹¹⁹ Regulatory enforcement of these provisions could help remedy the failure of facilities to facilitate voting, as might litigation in jurisdictions that recognize, or could recognize, a private right of action.¹²⁰

As the Centers for Medicare and Medicaid Services ("CMS"), the federal agency overseeing nursing homes, has explained in guidance, nursing homes must "ensure residents are able to exercise their Constitutional right to vote."¹²¹ This means not only that residents' right to vote "must not be impeded in any way by the nursing home and its facility staff" but also that facilities must take affirmative steps to enable resident voting.¹²² Accordingly, CMS has informed nursing homes that they are "required to support a resident in the exercise of their right . . . to vote, such as assisting with absentee or mail-in voting, or transporting residents to polling locations or ballot drop-boxes in a safe manner."¹²³ It further advised that, to comply with this obligation, "[n]ursing

¹¹⁸ Consistent with our focus on voting rights barriers that stem from residency in a long-term care facility, this Article does not explore all of the statutes that can be used to defend the voting rights of persons with disabilities. For example, it omits discussion of how statutes (such as the Voting Accessibility for the Elderly and Handicapped Act and the Help America Vote Act) can be used to challenge the problems associated with physically inaccessible polling places and privacy for voters who need assistance. For a discussion of these issues and legal tools that can be used to address them, see generally Belt, *Contemporary*, *supra* note 6; Syed et al., *Designing Accessible*, *supra* note 95; and Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 828 (2005) (discussing these and other statutes mandating accessibility and privacy in voting systems).

¹¹⁹ See 42 C.F.R. § 483.10(b) (2023) ("The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States."); *id.* § 483.10(b)(1) (2021) (nursing homes "must ensure that the resident can exercise his or her rights without interference, coercion, discrimination, or reprisal from the facility"); see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (holding right to vote is fundamental because it is preservative of all other rights).

¹²⁰ See NINA A. KOHN, *ELDER LAW: PRACTICE, POLICY, AND PROBLEMS* 431 n.2 (2d ed. 2020) (summarizing court decisions considering whether the NHRA provides private right of action).

¹²¹ NURSING HOME RESIDENTS' RIGHT TO VOTE MEMORANDUM, *supra* note 41, at 1.

¹²² *Id.* at 2.

¹²³ *Id.*

homes should have a plan to ensure residents can exercise their right to vote, whether in-person, by mail, absentee, or other authorized process.”¹²⁴

Those seeking to improve enforcement of nursing homes’ obligations to support resident voting have several avenues. First, they may trigger regulatory oversight by making a complaint against the violating facility to the appropriate state regulatory agency. Even if the complaint is substantiated by a state survey agency, however, the nursing facility is unlikely to face any meaningful penalties. In general, when state regulators responsible for enforcement of the NHRA find that facilities have violated a resident’s rights, they rarely impose monetary fines or other substantial penalties.¹²⁵ Rather, the typical response is merely to direct the facility to correct the deficiency, and inspectors may not even follow up to ensure the correction is made.¹²⁶ But, even absent more substantial interventions by regulators, such enforcement actions might better inform facilities about voting barriers facing residents and of their obligations to facilitate voting.

Second, an individual whose voting rights have not been supported by their nursing home may attempt to enforce rights granted by the NHRA and its implementing regulations through litigation. This, however, is likely to run up against a substantial obstacle: a majority of courts that have considered the question have concluded that the NHRA does not include a private right of action. To date, only one federal circuit court has found that it does,¹²⁷ and subsequent opinions have suggested that the court’s finding may be limited to public nursing homes.¹²⁸ Thus, even in the Third Circuit, the private right of action is arguably only applicable to public nursing homes (which make up a mere seven percent of the total U.S. nursing home industry).¹²⁹

¹²⁴ *Id.*

¹²⁵ Penalties are not even the norm for deficiencies related to resident abuse. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-433, NURSING HOMES: IMPROVED OVERSIGHT NEEDED TO BETTER PROTECT RESIDENTS FROM ABUSE 17-18 (2019) [hereinafter GAO, IMPROVED OVERSIGHT] (finding penalties were implemented in fewer than eight percent of cases where nursing homes were cited for abuse deficiencies).

¹²⁶ *See* Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 GEO. L.J. ONLINE 1, 8-9 (2021) [hereinafter Kohn, *Nursing Homes, COVID-19*] (describing underenforcement of regulations, including the NHRA, meant to protect nursing home residents).

¹²⁷ *See* *Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel*, 570 F.3d 520, 522 (3d Cir. 2009) (holding that the NHRA includes private right of action).

¹²⁸ *See, e.g., Taormina v. Suburban Woods Nursing Homes, LLC*, 765 F. Supp. 2d 667, 671-72 (E.D. Pa. 2011) (dismissing 42 U.S.C. § 1983 suit brought against private nursing home and distinguishing *Grammer* on grounds that defendant nursing home in *Grammer* was publicly operated and was clearly operating under color of state law).

¹²⁹ HARRIS-KOJETIN ET AL., *supra* note 12, at 8 fig.4 (reporting 7.2% of nursing homes and 1.3% of residential care communities were government-owned during the time period studied).

Third, those seeking to hold facilities accountable for the duties imposed by the NHRA may seek to use other statutory authority to do so, including the Americans with Disabilities Act.¹³⁰

Such enforcement could go a long way toward ensuring that nursing home residents can exercise the right to vote. After all, as described in Part I, despite nursing homes' duty to support resident voting, nursing homes not only frequently fail to do so, but may also erect new barriers.

B. *Section 208 of the Voting Rights Act*

Section 208 of the VRA protects the right of individuals with disabilities, including long-term care residents, to receive assistance with voting.¹³¹ This includes the right to receive assistance from a person of their choosing—whether that be a family member, friend, or staff member of the facility in which they reside—with obtaining and casting a ballot. Specifically, Section 208 of the VRA provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice.”¹³² The only limitations are that the person providing the assistance may be neither the voter’s employer or an agent of that employer, nor an officer or agent of the voter’s union.¹³³

The VRA’s broad definitions of “vote” and “voting” mean that Section 208’s protections extend to a broad array of types of assistance.¹³⁴ Under the VRA, the terms “vote” and “voting” include “all action necessary to make a vote effective in any primary, special, or general election.”¹³⁵ Section 208, moreover, specifies that this includes assistance with registration and “other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly.”¹³⁶ Thus, although state actors implementing Section 208 have traditionally focused on ensuring that individuals are permitted to have assistants accompany them into a voting booth,¹³⁷ as courts have recognized it requires,¹³⁸ Section 208’s reach is not limited to assistance at a designated polling place. Rather, the most natural reading of its language—and the one that has been

¹³⁰ See *infra* Section III.D.

¹³¹ 52 U.S.C. § 10508.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* § 10310(c)(1).

¹³⁵ *Id.*

¹³⁶ See *id.*

¹³⁷ See, e.g., *Cases Raising Claims Under Section 208 of the Voting Rights Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/cases-raising-claims-under-section-208-voting-rights-act> [<https://perma.cc/Z4C4-2S2F>] (last updated July 20, 2022) (describing past enforcement actions under Section 208, which focused on its application to obtaining assistance during in-person voting).

¹³⁸ See, e.g., *Ark. United v. Thurston*, No. 20-CV-5193, 2022 WL 4097988, at *15 (W.D. Ark. Sept. 7, 2022) (holding Section 208 preempted state statute limiting number of people that a given person may assist at polling place to six).

accepted by most courts that have considered the question, as set forth below—is that it also protects the right to assistance with aspects of the voting process that take place outside of a polling place.

Perhaps most importantly for long-term care residents, who frequently vote by mail-in or absentee ballot,¹³⁹ the VRA provides potentially broad protection for an individual’s right to assistance with obtaining, completing, and returning a mail in ballot. Courts considering the question have, in recent cases, frequently concluded that Section 208 applies to the absentee balloting context.¹⁴⁰ As the Fifth Circuit explained in rejecting Texas’s argument that Section 208 merely covers a voter’s choice of assistance “inside the ballot box,” the statute’s language “plainly contemplates more than the mechanical act of filling out the ballot” and includes “‘casting a ballot’ as ‘only one example in a nonexhaustive list of actions that qualify as voting.’”¹⁴¹ Consistent with this understanding, a North Carolina federal district court considering whether a state could prohibit nursing home employees from assisting residents with voting held, based on the plain text of the statute, that Section 208 applies to assistance with both completing and returning an absentee ballot.¹⁴²

Nevertheless, existing case law suggests courts may be less willing to find that Section 208 protects the right of individuals with disabilities to choose who returns their ballot than to choose who assists them with reading and marking that ballot. Although there is no meaningful distinction from the plain language of the VRA definition of “voting” between filling out and submitting a ballot—both of which are required to make one’s vote count—existing case law is more mixed on assistance with returning an absentee ballot. In 2022, the Western District of Wisconsin held that “the VRA requires that plaintiffs be allowed to

¹³⁹ See Kohn, *Preserving Voting Rights*, *supra* note 19, at 1075 (“[W]hen nursing home residents vote, they typically utilize an absentee ballot.”).

¹⁴⁰ In one contrary case—a case of a losing candidate challenging votes cast in nursing homes—an Illinois state court analyzed Section 208’s application to the absentee ballot context, including the use of phrases such as “within the voting booth” in its legislative history, and found that nothing “established that the federal legislature intended to preempt the rights of state legislatures to restrict absentee voting, and, particularly, who may return absentee ballots.” *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004). That case was favorably cited in *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021 (E.D. Tex. Aug. 7, 2008), which considered and similarly upheld an absentee ballot assistance restriction as consistent with Section 208. *Id.* at *7. However, it appears that the more recent (and more authoritative) Fifth Circuit analysis in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 606 (5th Cir. 2017), coming to the opposite conclusion has had greater reach based on its treatment in the cases discussed. *Id.* at 616.

¹⁴¹ *OCA-Greater Hous.*, 867 F.3d at 615.

¹⁴² See *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 234 (M.D.N.C. 2020) (“The court finds, as an initial matter, voting using an absentee ballot constitutes ‘voting’ under the VRA”); see also *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020) (considering whether plaintiffs could challenge limitation on who may assist with casting absentee ballot, finding “apparent conflict” between the limitation and the VRA, and suggesting that Section 208 applies in absentee voting context).

choose a person to assist them with mailing or delivering their absentee ballot” and, therefore, the VRA preempted Wisconsin law prohibiting such assistance because “returning a ballot is one of the ‘action[s] necessary to make a vote effective.’”¹⁴³ By contrast, two years earlier, a Georgia federal district court denied plaintiffs’ motion to enjoin a statute limiting who may assist a voter in returning an absentee ballot, because it found the question of whether Section 208 applied in the absentee ballot context to be “a question too close to call” and therefore not resolvable under the “substantial likelihood of success” standard for granting a preliminary injunction.¹⁴⁴ Similarly, the Supreme Court of Minnesota held that Section 208 did not preempt a state statute limiting the number of absentee ballots an individual assistor could deliver to three,¹⁴⁵ although it simultaneously held that Section 208 preempted a statute limiting the number of people an individual could assist with *marking* a ballot to three.¹⁴⁶ The Minnesota court noted the broad reach of the VRA definition of “vote,” yet seemingly ignored the fact that under the VRA’s plain language, delivery of one’s ballot should qualify as “voting” as it is an “action required by law prerequisite . . . to having [a] ballot counted.”¹⁴⁷

But even if courts were to limit Section 208’s coverage in the ballot return context, Section 208 would provide powerful protection against some of the most egregious restraints on the voting rights of long-term care residents. Section 208 preempts the type of state statutes that purport to prevent residents of institutional care settings from obtaining assistance from the staff of nursing homes or hospitals.¹⁴⁸ For example, Section 208 has been held to preempt the North Carolina statute that makes it a felony for staff of nursing homes, clinics, hospitals, and rest homes to assist with absentee voting, including by requesting the ballot, providing witness signatures, and assisting the voter.¹⁴⁹ Similarly, Section 208 should be read as preempting a Louisiana statute that prevents a voter from obtaining assistance from any employee of a nursing home, at least in certain circumstances.¹⁵⁰ Such statutes impermissibly narrow the right that

¹⁴³ *Carey v. Wis. Elections Comm’n*, No. 22-cv-402, 2022 WL 3910457, at *9 (W.D. Wis. Aug. 31, 2022).

¹⁴⁴ *See New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1302 (N.D. Ga. 2020).

¹⁴⁵ *See DSCC v. Simon*, 950 N.W.2d 280, 290-91 (Minn. 2020) (holding lower court “abuse[d] its discretion in finding a likelihood of success that three-voter limit on delivering marked ballots is . . . preempted” (citation omitted)).

¹⁴⁶ *Id.* at 290.

¹⁴⁷ 52 U.S.C. § 10310(c)(1).

¹⁴⁸ *See supra* Section II.B.

¹⁴⁹ *Disability Rts. N.C. v. N.C. State Bd. of Elections*, No. 21-CV-361, 2022 WL 2678884, at *6 (E.D.N.C. July 11, 2022) (“All challenged North Carolina provisions are shown to be in conflict with federal law, and thus are preempted by the Voting Rights Act. States may not limit the federally guaranteed right of disabled voters to access assistance guaranteed by Section 208.”); *see* N.C. GEN. STAT. § 163-226.3 (2022).

¹⁵⁰ LA. STAT. ANN. § 18:1333(G)(4)(a) (2023).

Congress created with the passage of Section 208.¹⁵¹ As set forth above, under Section 208, voters with disabilities may obtain assistance from a person of their choosing, with two narrow exceptions (employers and unions), to take the actions necessary to cast a ballot (including absentee ballots).¹⁵²

Beyond statutes that explicitly limit residents' rights to vote with assistance from nursing home staff, Section 208 also has a broader reach and can address other state statutes that create barriers to voting. For example, Section 208 should inform interpretations of long-term care voting statutes that provide for supervised absentee ballot programs in nursing homes.¹⁵³ In line with Section 208's provision that a person with a disability can choose who assists them in voting, state statutes providing for such programs should not be read to preclude voting via other means or with other assistors.¹⁵⁴ To the extent a state treated such a program as residents' only avenue for obtaining voting assistance, residents could similarly challenge such a policy under Section 208. For example, Section 208 could be employed to challenge Tennessee's statute that limits residents from voting absentee through means other than through its supervised Absentee Voting Deputy program.¹⁵⁵ Although existing Section 208 case law has not addressed this situation, residents could argue that this limitation unlawfully curtails the right to vote with the assistance of one's choosing by limiting designated assistors beyond the categories Congress set forth, and therefore is also preempted. Also, some states limit who may return an absentee ballot on a voter's behalf to certain designated people, such as immediate family members, and do not make exceptions for nursing home

¹⁵¹ Conflict preemption exists where a "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" and, in that situation, "federal law must prevail." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015).

¹⁵² Principles of legislative interpretation provide additional support for the argument that statutes contravening Section 208 are unconstitutional. Under the canon of interpretation known as *expressio unius est exclusio alterius*, the expression of one is the exclusion of others. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002). In other words, because Congress made other exceptions but did not mention nursing home employees, Congress can be assumed to have meant to protect the right to access all other assistors, including a long-term care employee. Further, the reading that Section 208 preempts statutes that restrict healthcare employees from assisting long-term care residents accords with the legislative canon that exceptions to statutes are to be construed narrowly and remedial statutes are to be construed broadly. *See Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968).

¹⁵³ *See infra* Section III.E.

¹⁵⁴ Compare CONN. GEN. STAT. § 9-159q (2023) (setting forth mandatory supervised absentee voting program, leaving unstated whether residents in covered facilities may opt-out of the program and seek other forms of assistance if they so choose), and JANICKI, *supra* note 116, with FLA. STAT. § 101.655 (2023) (setting forth mandatory supervised absentee voting program, but specifying that residents may opt to complete their ballot at other times and with other assistors).

¹⁵⁵ *See supra* notes 113-14 and accompanying text.

residents or people with disabilities.¹⁵⁶ Under Section 208, such a limitation may also violate the rights of residents with disabilities.

Those seeking to use Section 208 to protect long-term care residents' right to voting-related assistance may sue officials responsible for administering or enforcing state statutes that conflict with Section 208's requirements and seek declaratory or injunctive relief, in line with analogous Section 208 preemption actions brought in other contexts.¹⁵⁷ Consistent with court precedent striking down state statutes that limit the right to vote with assistance as preempted by Section 208, a challenge to the Louisiana and Tennessee statutes—and any other statutes placing limitations on the right to vote with the assistance of a nursing home or hospital staff—would be well-supported by existing case law, including *OCA-Greater Houston*.¹⁵⁸

C. *Section 7 of the National Voter Registration Act*

As discussed earlier, voter registration is a significant barrier to long-term care residents exercising their right to vote. Compliance with Section 7 of the NVRA of 1993 could go a long way toward removing obstacles to registration faced by residents.

Section 7 requires public-assistance agencies and state-funded disability programs to give beneficiaries opportunities to register to vote and assistance with doing so.¹⁵⁹ It requires states to designate as voter registration agencies “all offices in the State that provide public assistance” and “all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.”¹⁶⁰ Once an agency is designated as a “voter registration entity,” it must affirmatively offer voter registration forms to its beneficiaries, and offer assistance to applicants in completing and submitting registration forms, which can include submitting them on beneficiaries' behalf.¹⁶¹

¹⁵⁶ See, e.g., MICH. COMP. LAWS § 168.764a (2023) (limiting ability to return absentee ballot to certain relatives).

¹⁵⁷ See, e.g., *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (noting “the VRA, which Congress passed pursuant to its Fifteenth Amendment enforcement power, validly abrogated state sovereign immunity” and “sovereign immunity has no role to play” in preenforcement action against state voting restriction preempted by Section 208).

¹⁵⁸ *Id.* at 615. The lower court decision that the Fifth Circuit upheld in *OCA-Greater Houston* based its decision on conflict preemption, noting it is a “fundamental principle of the Constitution . . . that Congress has the power to preempt state law.” *OCA-Greater Hous. v. Texas*, No. 15-CV-00679, 2016 WL 9651777, at *9 n.9 (W.D. Tex. Aug. 12, 2016) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)).

¹⁵⁹ 52 U.S.C. § 20506(a) (describing designation of voter registration agencies and services such agencies should provide).

¹⁶⁰ *Id.* § 20506(a)(2)(B).

¹⁶¹ See *id.* § 20506(a)(4)(A) (describing services that designated voter registration agencies shall make available to beneficiaries).

A number of entities that routinely interact with long-term care residents thus have an affirmative responsibility to provide residents with voter registration services.¹⁶² Crucially, state agencies that assist with Medicaid applications fall under the NVRA's "public assistance" provision.¹⁶³ Because over sixty percent of residents of nursing homes¹⁶⁴ and over sixteen percent of residents of assisted living facilities¹⁶⁵ receive Medicaid, expansion of Section 7 compliance among such agencies would substantially expand the registration opportunities afforded to those living in long-term care institutions.¹⁶⁶

Other entities that provide services and support to long-term care residents are also mandated to provide voter registration services under the NVRA.¹⁶⁷ For example, Aging and Disability Resource Centers ("ADRC"), of which there are more than 500 nationwide,¹⁶⁸ help older adults and people with disabilities connect with long-term care services and supports.¹⁶⁹ Generally, based on their

¹⁶² When passing the NVRA, Congress recognized that it is "essential that as many [disability services providers] as possible . . . offer voter registration services" because a patchwork of separate state programs—independent living centers or vocational rehabilitation centers, for instance—serve this population and in small percentages. Congress made clear that it wanted to reach populations of people with disabilities who tend to be isolated—those over the age of fifty-five, those located outside large cities, and those who rely on services by way of home visits, for example. *See* S. REP. NO. 103-6, at 16 (1993) (setting forth purposes of the NVRA).

¹⁶³ *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 121-24 (2d Cir. 2000) (noting state and local government offices providing Medicaid application services must be designated as mandatory voter registration agencies).

¹⁶⁴ HARRIS-KOJETIN ET AL., *supra* note 12, at 21 fig.23 (reporting 61.8% of nursing home residents had Medicaid as payer source).

¹⁶⁵ *Id.* (reporting 16.5% of residential care facility residents received Medicaid); *Facts & Figures: Finance*, NAT'L CTR. FOR ASSISTED LIVING, <https://www.ahcancal.org/Assisted-Living/Facts-and-Figures/Pages/default.aspx> [<https://perma.cc/LBG4-YE5D>] (last visited Apr. 18, 2023) (reporting 16.5% of assisted living residents are Medicaid beneficiaries).

¹⁶⁶ As one limitation, as the leading Second Circuit case on the topic has held, the provision regarding the mandatory agency-based registration system applies to state and local government offices providing Medicaid applications in connection with medical services, and not federal or nongovernmental ones. *See Hammons*, 202 F.3d at 120-21 (noting the NVRA does not allow for states mandating federal and nongovernmental offices to provide voter registration assistance).

¹⁶⁷ *See* 52 U.S.C. § 20506(a)(2) (describing offices that state can designate as voter registration agencies under the NVRA).

¹⁶⁸ *See* TINA BARRETTO, REKHA VARGHESE, SARAH PEDERSEN, LEANNE CLARK-SHIRLEY, SANDEEP SHETTY, MANAN ROY, SHARANJIT TOOR & MICHAEL SIERS, IMPAQ INT'L, LLC; ROSANNA BERTRAND & LUISA BUATTI, ABT ASSOCS., NATIONAL STUDY OF AGING AND DISABILITY RESOURCE CENTERS 10 (2014), <https://acl.gov/sites/default/files/programs/2017-02/ADRCs-final-study-report.pdf> [<https://perma.cc/R5ZQ-3GBK>] (noting expansion of ADRC program, amounting to 525 ADRC sites in the United States).

¹⁶⁹ *See, e.g., Aging and Disability Resource Centers*, ADMIN. FOR CMTY. LIVING, <https://acl.gov/programs/aging-and-disability-networks/aging-and-disability-resource-centers> [<https://perma.cc/F4RZ-RUSY>] (last updated Dec. 13, 2017) (describing ADRCs). In addition, Area Agencies on Aging ("AAA"), of which there are more than 600 nationwide,

function and explicit purpose of serving people with disabilities and the fact that in most cases they receive state funds,¹⁷⁰ many ADRCs likely meet the definition of a NVRA disability services agency: they frequently are “state-funded programs primarily engaged in providing services to persons with disabilities.”¹⁷¹ Thus, in instances where the ADRCs meet those criteria, states should designate them as NVRA entities and further NVRA litigation could compel them to do so.¹⁷²

In addition, state long-term care ombudsman’s offices meet the definition of a mandatory Section 7 NVRA agency.¹⁷³ Created under the Older Americans

provide referrals into long-term care and may assist residents and prospective residents with Medicaid applications and with seeking other disability services. *See* NAT’L ASS’N OF AREA AGENCIES ON AGING & MIAMI UNIV. SCRIPPS GERONTOLOGY CTR., TRENDS AND NEW DIRECTIONS: AREA AGENCIES ON AGING SURVEY 2014, at 2-3 (2014), <https://www.usaging.org/files/AAA%202014%20Survey.pdf> [<https://perma.cc/3CWC-8XY3>] (providing summary of AAA’s expansion and its services). In many states, AAAs also operate as ADRCs. *See, e.g., id.* at 15 (giving overview of varying ADRC and AAA structures). They may also qualify as NVRA disability services agencies, though a litigant may need to make a showing that they are “offices in the State” per 52 U.S.C. § 20506(a)(2)(B) (which courts have interpreted to mean governmental departments or institutions, or subdivisions of them), and are primarily engaged in serving aging people with disabilities. *See* Nat’l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 292 (4th Cir. 1998) (defining “office” as “subdivision of a government department or institution”). This determination will vary by state, depending on the specific programs provided by the agency.

¹⁷⁰ ADRCs and AAAs often receive either, or both, state and federal funding. *See* BARRETTO ET AL., *supra* note 168, at 55-56 (listing funding sources of ADRCs, with state funds as most common source); NAT’L ASS’N OF AREA AGENCIES ON AGING & MIAMI UNIV. SCRIPPS GERONTOLOGY CTR., *supra* note 169, at 47 (noting sixty-eight percent of AAAs receive state general revenue). The NVRA covers “[s]tate-funded” programs, so a litigant seeking to enforce NVRA obligations on an agency should ensure it indeed receives state funding. 52 U.S.C. § 20506(a)(2)(B).

¹⁷¹ 52 U.S.C. § 20506(a)(2)(B).

¹⁷² That ADRCs and AAAs might have programs geared toward both disabled and nondisabled people, does not bar their coverage under Section 7, as courts have explained in the context of state college and university offices. *See, e.g., Allen*, 152 F.3d at 292 & n.8 (noting offices providing services for nondisabled people could qualify as voter registration agencies under the NVRA).

¹⁷³ Generally, the Older Americans Act requires states receiving federal funds to establish an Office of the State Long-Term Care Ombudsman and carry out certain programming geared toward advancing the rights of residents. *See* 42 U.S.C. § 3058g(a)(1) (describing establishment of state long-term care ombudsman program to receive federal allotment). The state may elect to carry out the programs by contract with a public agency or nonprofits and may designate a local government entity to represent the State Ombudsman. *See id.* § 3058g(a)(4)-(5) (describing purpose and structure of program and setting forth requirements for states). Those offices visit nursing homes, monitor conditions, and interview residents about the conditions in facilities. *Id.* § 3058g(a)(3) (explaining functions of state long-term care ombudsman offices). Their statutory authorization contemplates that they will both coordinate with disability services and serve residents with “limited or no decisionmaking

Act and funded by a mix of state and federal funding,¹⁷⁴ state long-term care ombudsman's offices help residents navigate a variety of obstacles within a facility and address rights violations. Based on the plain text of the NVRA, those entities should also be held to fall under the broad Section 7 disability services provision—even though states often have not designated them as such.¹⁷⁵

Section 7 may also obligate state-owned nursing homes to help their residents register to vote. Specifically, state-owned nursing homes appear to fall squarely under Section 7's coverage as they are "offices in the State" that provide state-funded programs primarily engaged in serving people with disabilities.¹⁷⁶ Although state-owned facilities make up the minority of nursing homes (most nursing homes are privately owned),¹⁷⁷ enforcement of the NVRA obligations

capacity." *Id.* § 3058g(d)(2) (clarifying required duties of state long-term care ombudsman offices).

¹⁷⁴ See *LTC Ombudsman National and State Data: Table A-9: LTC Ombudsman Program Funding Totals and Percents for FY 2015 as of 03/14/2017*, ADMIN. FOR CMTY. LIVING [hereinafter *LTC Ombudsman National and State Data*], <https://acl.gov/programs/long-term-care-ombudsman/ltc-ombudsman-national-and-state-data> (last updated Sept. 9, 2020) (documenting that all programs receive at least some state funds, with average of 39.5% state funding total).

¹⁷⁵ Although not all states make publicly available their list of designated NVRA entities, some states that have published which entities they have designated—including California, South Carolina, and others—have not included their aging services offices. See, e.g., *Voter Registration Agency Contact Roster*, CAL. SEC'Y OF ST., <https://www.sos.ca.gov/elections/voter-registration/nvra/voter-registration-agencies/vr-agency-contact-roster> [<https://perma.cc/4V6J-DXK6>] (last visited Apr. 18, 2023) (listing NVRA agencies designated in California, and not including its AAAs, ADRCs, long-term care ombudsmans' offices, or publicly owned nursing homes); see also, e.g., S.C. CODE ANN. § 7-5-310 (2023). As one contrary example that may demonstrate the impact of NVRA litigation, Louisiana has designated many of its aging services agencies (including long-term care entities) as mandatory voter registration agencies under the NVRA. See LA. DEP'T OF HEALTH, AGING & ADULT SERVS., NATIONAL VOTER REGISTRATION ACT (NVRA) MANUAL 13 (2020) (listing agencies identified as mandatory NVRA entities). Louisiana is one of only a few states that have been subject to litigation enforcing the NVRA Section 7 disability services provision. *Cases Raising Claims Under the National Voter Registration Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act> [<https://perma.cc/B5XD-SCL5>] (last updated July 7, 2022) (listing Louisiana enforcement action as only one of three NVRA actions in disability services context). Louisiana's more expansive designations of disability services agencies under the provision may be the result of litigation enforcing the provision. See LA. DEP'T OF HEALTH, AGING & ADULT SERVS., *supra*, at 7-8 (referencing a district court decision underlying the state's designations of settings where NVRA activities must be provided).

¹⁷⁶ 52 U.S.C. § 20506(a)(2). By contrast, long-term care facilities owned and operated by the federal government, including the Department of Veterans Affairs, do not fall under Section 7's mandatory designation system. Although state governments can designate them as voter registration entities with their agreement, the NVRA obligations of federal entities remain nonmandatory. See *id.* § 20506(a)(3) (listing additional offices that may be designated as voter registration agencies).

¹⁷⁷ HARRIS-KOJETIN ET AL., *supra* note 12, at 8 fig.4 (reporting that, as of 2016, approximately 69.3% of nursing homes were privately owned, 23.5% were owned by

among state-owned nursing homes could nevertheless be valuable to residents in these facilities.

Moreover, the NVRA offers many long-term care residents the opportunity to receive voter registration services when they interact with a wide variety of state-funded disability services programs.¹⁷⁸ Unfortunately, it appears that many of the agencies that should provide voter registration services to long-term care residents do not offer these mandated services. First, the registration data that states provide to the Election Assistance Commission (“EAC”) every two years, as required by the NVRA,¹⁷⁹ clearly indicates poor NVRA compliance in the disability services context across the country. Between 2016 and 2018, most states reported fewer than 500 registrations through disability services offices, with many states reporting fewer than ten, and several states reporting none.¹⁸⁰ Yet, a single state disability services agency may interact with thousands of clients in a year¹⁸¹—clients who are especially likely to be unregistered¹⁸²—making it unlikely that registrations would be so scarce if the NVRA were fully enforced in all settings. Indeed, even states that have taken steps to comply with the Section 7 disability services provision, and who have made public their designated NVRA disability services entities, have not included key entities serving people with disabilities living in long-term care settings, such as state-owned nursing homes, in their designations of NVRA-covered entities.¹⁸³

nonprofits; thus, government-owned homes, which comprise approximately 7.2% of nursing homes, are the clear minority).

¹⁷⁸ See 52 U.S.C. § 20506(a)(2)(B) (requiring state offices that engage in disability services to be designated as voter registration agencies).

¹⁷⁹ See 11 C.F.R. § 9428.7 (2023) (requiring chief state election officials to report to EAC).

¹⁸⁰ See U.S. Election Assistance Comm’n, *EAC 2018 Data Visualization Tool*, TABLEAU PUB., https://public.tableau.com/app/profile/u.s.election.assistance.commission/viz/EAVS2018DataViz-Labeld_11_25/EACDataVizTool (last updated Nov. 24, 2022) (indicating total number of voter registration forms per state from agencies assisting people with disabilities in 2018); U.S. Election Assistance Comm’n, *EAC 2016 Data Visualization Tool*, TABLEAU PUB., https://public.tableau.com/app/profile/u.s.election.assistance.commission/viz/EAVS2016DataViz-FinalVersion_1/EACDataVizTool (last updated Nov. 18, 2022).

¹⁸¹ See SHERYL LARSON, HEIDI ESCHENBACHER, SANDY PETTINGELL & LYNDA ANDERSON, NAT’L RESIDENTIAL INFO. SYS. PROJECT; BRITTANY TAYLOR, HUM. SERVS. RSCH. INST.; MARY SOWERS & MARY LOU BOURNE, NAT’L ASS’N OF STATE DIRS. OF DEVELOPMENTAL DISABILITIES SERVS., IN-HOME AND RESIDENTIAL LONG-TERM SUPPORTS AND SERVICES FOR PERSONS WITH INTELLECTUAL OR DEVELOPMENTAL DISABILITIES: STATUS AND TRENDS 2017, at 32-34 (2020), https://ici-s.umn.edu/files/aCHyYaFjMi/risp_2017As [<https://perma.cc/U2YK-PZHB>] (estimating 1.48 million people are served by state intellectual disability services agencies nationwide); *LTC Ombudsman National and State Data*, *supra* note 174 (noting over 50,000 resident complainants were served by long-term care ombudsman programs in fiscal year 2015, with many states’ programs handling thousands of complainants).

¹⁸² See *supra* Section II.B (explaining Census data reveals people with disabilities are less likely than nondisabled people to be registered to vote).

¹⁸³ See *Voter Registration Agency*, *supra* note 175 (listing NVRA agencies in California, not including publicly owned nursing homes); see also S.C. CODE ANN. § 7-5-310 (2023).

Historically, states' NVRA compliance has increased dramatically when litigators seek to enforce its requirements.¹⁸⁴ Thus, the lack of enforcement of the NVRA disability services provision in agencies that serve residents of long-term care facilities is likely tied to the fact that this provision has only rarely been the subject of litigation¹⁸⁵ (and the occasional litigation that has enforced the provision focused on a different population of people with disabilities—students at state universities—not on aging populations in particular).¹⁸⁶ Moreover, given the overall success of the NVRA advocacy and litigation efforts in increasing agency-based voter registration in the public assistance context,¹⁸⁷ NVRA enforcement in disability services settings would have an especially high potential for increasing voter registration opportunities among residents.

Litigants seeking to enforce the NVRA among state disability services programs may pursue action in federal court. The NVRA provides for civil enforcement and a private right of action for aggrieved parties to seek injunctive and declaratory relief in federal district court and provides for a presuit notice procedure with mandatory notice requirements depending on when the violation occurs in relation to an election.¹⁸⁸ In sum, given the substantial registration barriers facing long-term care residents, and the demonstrated impact of past NVRA litigation, NVRA compliance litigation could play an important role in helping long-term care residents vote.

D. *The Americans with Disabilities Act*

The ADA protects residents of long-term care facilities with disabilities from discrimination by public services and programs, including state and local voting

¹⁸⁴ For example, the number of voter registrations through NVRA-mandated opportunities at public assistance agencies after the implementation of the NVRA was at an all-time low in 2005 when voting rights litigators began an education and enforcement campaign. In the next six years, those registrations increased by over 150%. PROJECT VOTE, VOTER REGISTRATION AT PUBLIC ASSISTANCE AGENCIES 5 (2014).

¹⁸⁵ See, e.g., *Cases Raising Claims Under the National Voter Registration Act*, *supra* note 175 (listing only three U.S. Department of Justice enforcement actions of the NVRA disability services provision).

¹⁸⁶ See, e.g., *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 847-48 (D. Md. 2001) (summarizing plaintiff's complaint that Disability Support Services office of University of Maryland did not provide proper voter registration assistance to students with disabilities as required under the NVRA).

¹⁸⁷ See also LAURA WILLIAMSON, PAMELA CATALDO & BRENDA WRIGHT, TOWARD A MORE REPRESENTATIVE ELECTORATE 11-15 (2018) (giving examples of how advocacy and litigation efforts led to greater compliance of states with their NVRA obligations and increased voter registration through public assistance agencies).

¹⁸⁸ 52 U.S.C. § 20510. Under the NVRA, the aggrieved person may provide written notice to the chief election official of the state. If the violation is not corrected within ninety days after the notice is received, or within twenty days if the violation occurred within 120 days before a federal election, the person may bring a civil action in district court for declaratory or injunctive relief. Within thirty days of an election, the aggrieved person may file suit without providing presuit notice first. See *id.*

programs and programs within nursing homes themselves. The ADA provides a path toward obtaining a reasonable modification to a voting system and prohibits public entities from imposing criteria or methods of administration that tend to exclude people with disabilities.

State and local voting programs fall under Title II of the ADA.¹⁸⁹ Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁹⁰ In the context of state or local government services, a service, program, or activity must, “when viewed in its entirety,” be “readily accessible to and usable by individuals with disabilities.”¹⁹¹ However, courts have made clear that it is not sufficient merely for polling places to be accessible; both absentee voting and polling places must be accessible under the ADA.¹⁹²

To show a violation of Title II, plaintiffs must demonstrate that “(1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability.”¹⁹³ A state or local voting program violates the ADA if it fails to make a reasonable modification in voting procedures that an individual with a disability—including a long-term care resident with a disability—needs to exercise their right to vote.¹⁹⁴ The ADA’s implementing regulations also prohibits public entities from “impos[ing] or apply[ing] eligibility criteria that

¹⁸⁹ In finding so, courts have noted that “[v]oting is a quintessential public activity,” and that with the ADA’s passage, Congress intended to prevent people with disabilities from being relegated to a “position of political powerlessness in our society.” *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) (quoting *Tennessee v. Lane*, 541 U.S. 509, 516 (2004)); see *Cal. Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229, 1235 (N.D. Cal. 2013) (construing the ADA to bring into its scope anything that public entities do, including administering voting programs).

¹⁹⁰ 42 U.S.C. § 12132.

¹⁹¹ 28 C.F.R. § 35.150(a) (2023). A public entity may comply with ADA requirements using “any . . . methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.” *Id.* § 35.150(b).

¹⁹² See *Nat’l Fed’n of the Blind*, 813 F.3d at 504 (“[W]e think it is far more natural to view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny for compliance with the ADA.”); *Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1, 12 (S.D.N.Y. 2020) (“The Fourth Circuit has held, and this Court agrees, that where, as here, a challenge is lodged to the accessibility of a widely-available absentee voting program, the ‘relevant public service or program at issue’ is . . . ‘the absentee voting program.’” (quoting *Nat’l Fed’n of the Blind*, 813 F.3d at 503)).

¹⁹³ *Nat’l Fed’n of the Blind*, 813 F.3d at 502-03 (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)) (stating elements required to make out claim under Title II of the ADA).

¹⁹⁴ *Id.* at 507 (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” (quoting 28 C.F.R. § 35.130(b)(7))).

screen out or tend to screen out” people with disabilities “from fully and equally enjoying any service, program, or activity.”¹⁹⁵ Further, public entities may not use “methods of administration . . . [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.”¹⁹⁶ When bringing a claim under the ADA, in addition to challenging voting policies that functionally exclude them, residents may propose a reasonable modification¹⁹⁷ to a voting program that will allow them the meaningful access they seek.¹⁹⁸

Thus, the ADA can be a powerful tool to attack restrictions on voting by individuals in long-term care imposed by state actors.¹⁹⁹ In the long-term care context, the ADA could be found to entitle residents to a variety of voting-related accommodations, tailored to the nature of the voting barrier and the context of the state’s voting program. Most crucially, plaintiffs could challenge the wide variety of obstacles that the reports discussed in Part I document, as well as to other barriers. In line with past decisions on the ADA, plaintiffs facing various challenges voting in nursing homes and long-term care facilities might request that state elections boards provide information to residents of the facility about voter registration and procedures, transportation to the polls, and the right to vote via absentee ballot free from obstructions.²⁰⁰ Any of those modifications may, depending on the circumstances, be necessary for a voting program to be “usable” by people with disabilities “when viewed in its entirety.”²⁰¹ Ultimately, the determination that a requested accommodation is required turns on an analysis of whether the requested accommodation is “reasonable”—which is a

¹⁹⁵ 28 C.F.R. § 35.130(b)(8).

¹⁹⁶ *Id.* § 35.130(b)(3).

¹⁹⁷ Modifications that would fundamentally alter a program, by contrast, are not required. *See Nat’l Fed’n of the Blind*, 813 F.3d at 508.

¹⁹⁸ *Id.* at 507.

¹⁹⁹ By contrast it does not require best practices. In one instance, a court found that a plaintiff’s request of making ballot-marking devices the default mode of voting for every voter was not reasonable but noted that making ballot-marking devices available for people with disabilities might have been. *See Nat’l Fed’n of the Blind, Inc. v. Lamone*, 438 F. Supp. 3d 510, 538 (D. Md. 2020). In reaching that conclusion, the court considered the administrative burden of providing ballot-marking devices to all voters. *Id.* at 546. And a district court found that introducing a new remote, accessible vote-by-mail system across New York State in advance of an election just four months away “would be a time-consuming and pain-staking process” that the state could not be expected to implement it in the span of just four months. *See Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1, 19 (S.D.N.Y. 2020).

²⁰⁰ As one example, an Ohio plaintiff with a disability who was unable to leave her home to cure her absentee ballot won an injunction requiring the state to give reasonable accommodations in the ballot cure process, after the state refused to require her county Board of Elections to visit her house to allow her to cure her absentee ballot. *Ray v. Franklin Cnty. Bd. of Elections*, No. 08-CV-1086, 2008 WL 4966759, at *6 (S.D. Ohio Nov. 17, 2008).

²⁰¹ *See* 28 C.F.R. § 35.150(a).

case-by-case, fact-bound determination.²⁰² In addition to reasonable modifications, plaintiffs could also challenge policies that prevent residents from voting. For instance, residents could challenge statutes that prohibit them from voting outside of designated facility voting programs (such as Tennessee's statute) as "criteria" or "methods of administration" that tend to prevent them from participating in elections.²⁰³

The ADA could also be employed to attack barriers to voting created by long-term care institutions themselves. Private nursing homes fall under Title III of the ADA because it covers "places of public accommodation,"²⁰⁴ and as such, residents with disabilities must have equal access to the services that they provide. Public nursing homes providing government services fall under Title II of the ADA, so they are subject to the same requirements. Thus, to the extent nursing homes provide services with voting, they must provide those services in an ADA-compliant manner. For example, the ADA clearly bars long-term care staff from engaging in "gatekeeping"—the practice of preventing people with cognitive disabilities from voting due to a perceived lack of voting capacity.²⁰⁵ As noted previously, although such practices have been condemned by experts, facilities have continued them.²⁰⁶

The ADA also can be used to ensure that, to the extent that long-term care facilities are supporting some residents with voting, they are not discriminating on the basis of disability in how they provide that assistance. For example, if a nursing home were (perhaps to comply with NHRA obligations) facilitating transportation for some residents, it may then be required to provide the reasonable accommodations needed to enable residents with mobility limitations to also access the transportation. If the facility were receiving mail from a state elections board and were providing that mail to residents in order to fulfill their obligation to facilitate voting, but did not take steps to ensure that residents with print disabilities could understand the contents of their voting-related mail, plaintiffs could similarly request a reasonable modification to that practice and, if it were denied, they may demonstrate an ADA violation.

An ADA claim brought against state boards of elections could be paired with a request for relief under Section 504 of the Rehabilitation Act of 1973. Section 504 protects qualified individuals from discrimination based on their

²⁰² See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 663 (2001) (holding that determining whether accommodation is required under Title III of the ADA requires individualized inquiry); *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) ("Although *Martin* was decided in the context of Title III of the ADA, we conclude that the individualized inquiry requirement is applicable to failure to accommodate actions under Title II of the ADA as well.").

²⁰³ See 28 C.F.R. § 35.130(b)(3).

²⁰⁴ *Id.* pt. 36 app. C, at 944 (explaining if private nursing home "facility permitted short-term stays or provided social services to its residents, it would be covered under the ADA either as a 'place of lodging' or as a 'social service center establishment,' or as both").

²⁰⁵ See *supra* Section II.A.

²⁰⁶ See *supra* Section II.A.2.

disability.²⁰⁷ Generally, “[c]laims under the ADA’s Title II and the Rehabilitation Act can be combined for analytical purposes because the analysis is ‘substantially the same.’”²⁰⁸ Often those claims will “rise and fall together.”²⁰⁹ Section 504 is “applicable if an instrumentality of local government receives federal financial assistance,” which state boards of elections do.²¹⁰ When bringing a Section 504 claim against a state board of elections, courts have required plaintiffs to assert in their pleadings that the defendants received federal financial assistance.²¹¹

Litigants could also use the ADA to address barriers to voting created by long-term care institutions. Perhaps most importantly, the ADA could thus be used to complement the Nursing Home Reform Act. Whether or not the ADA offers additional rights beyond what is already granted by that Act, it has one distinct advantage: a private right of action.²¹²

²⁰⁷ Specifically, Section 504 prevents employers and organizations from denying individuals with disabilities an equal opportunity to receive programs, benefits, and services and sets forth their rights to access programs, benefits, and services. Section 504 states, “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. § 794. The statute defines “program or activity” broadly to include departments, agencies, or other instrumentalities of state or local governments; corporations or partnerships receiving Federal financial assistance; and other entities, provided that the entity is receiving federal financial assistance. *Id.* As in the ADA, disability is defined broadly. *Id.* § 705(20)(A) (defining “individual with a disability” as someone with “a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and . . . can benefit in terms of an employment outcome from vocational rehabilitation services”). An express purpose of Section 504 is “to empower individuals with disabilities to maximize . . . independence, and inclusion and integration into society, through . . . the guarantee of equal opportunity.” *Id.* § 701(b)(1).

²⁰⁸ *Seremeth v. Bd. of Cnty. Comm’rs Frederick Cnty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012) (quoting *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995)).

²⁰⁹ *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 502 n.4 (4th Cir. 2016).

²¹⁰ *Am. Ass’n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1293 (M.D. Fla. 2002); see STATE ALLOCATIONS OF 2020 HAVA FUNDS (2019), https://www.eac.gov/sites/default/files/news/documents/2020HAVA_State_Allocation_Chart_with_Match.pdf [<https://perma.cc/KH72-GGTR>]; see also, e.g., *Disabled in Action v. Bd. of Elections in N.Y.*, 752 F.3d 189, 198 (2d Cir. 2014) (“BOE does not dispute that the voters plaintiffs represent are qualified individuals with disabilities or that it is a public entity that receives federal funding.”).

²¹¹ Courts have dismissed claims against individual defendant secretaries of state where it was not alleged that the individual received federal financial assistance. See *Smith*, 227 F. Supp. 2d at 1293-94 (holding plaintiffs could not state Rehabilitation Act claim against state officials unless they alleged receipt of federal financial assistance).

²¹² See, e.g., Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 447 (2007) (“Each title of the ADA allows for a private right of action.”); see also, e.g., *Frame v. City of Arlington*, 657 F.3d 215, 224 (5th Cir. 2011) (stating Title II and Section 504

In sum, the ADA has a great potential to address a wide array of voting barriers that arise for residents of nursing homes.

E. *State Statutes Applicable to Residents of Institutional Healthcare Settings*

Many states have special programs and procedures for voting in long-term care facilities and other institutional healthcare facilities. In Section I.B, we discussed how state statutes creating special procedures for voting by long-term care residents can selectively burden the voting rights of long-term care residents. By contrast, some states provide significant protection for residents' voting rights by offering in-person assistance with voting. Increased enforcement of these statutory provisions—including through targeted litigation—could play an important role in increasing long-term care residents' access to the ballot.

Many states—including Florida,²¹³ Iowa,²¹⁴ Oklahoma,²¹⁵ and Rhode Island²¹⁶—have created procedures that can be used to provide long-term care residents with assistance with casting a ballot through their nursing home voting programs, assistance which (as discussed above) may not be available to the resident otherwise. While some statutes are silent as to the nature of that assistance, others specify that it includes assisting in marking and filling out the ballot.²¹⁷

Some states additionally require that election officials personally deliver ballots to the facility (once certain criteria are met), an accommodation that can be particularly helpful due to the difficulties residents may face accessing postal services or traveling to the polls in person. These states include Arizona,²¹⁸

confer private rights of action, as do implementing regulations that “simply apply” their statutory provisions and serve as the “authoritative interpretation of the statute”).

²¹³ FLA. STAT. § 101.655 (2023) (promulgating procedure to assist in delivering ballots to electors residing in assisted living or nursing home facilities at the request of facility administrators, supervise voting of the ballots, and assist electors in voting when requested).

²¹⁴ IOWA CODE § 53.22(2) (2023) (promulgating procedure to have special precinct election officers deliver ballots to residents of healthcare facilities, assisted living programs, and hospitals who have applied for an absentee ballot and assist in filling out absentee ballots for electors when requested).

²¹⁵ OKLA. STAT. tit. 26, § 14-115 (2023) (promulgating procedures to have absentee voting board deliver ballots to “incapacitated elector[s]” residing in nursing home or veterans center and assist in filling out and casting absentee ballot when requested).

²¹⁶ 17 R.I. GEN. LAWS § 17-20-14(a) (2023) (mandating creation of bipartisan pairs of supervisors to supervise and assist with casting of absentee ballots at nursing homes and similar institutions).

²¹⁷ Compare IOWA CODE § 53.22(2)(A)(3)(c) (providing that “persons authorized . . . to deliver an absentee ballot . . . may assist the applicant in filling out the ballot”), with FLA. STAT. ANN. § 101.655(5) (providing that “[i]f any elector requests assistance in voting . . . the elector may receive the assistance” but not specifying what assistance might include).

²¹⁸ ARIZ. REV. STAT. ANN. § 16-549(C) (2023) (specifying that ballots requested via procedure for electors “confined as the result of a continuing illness or physical disability . . . shall be delivered to the elector in person by a special election board”).

Colorado,²¹⁹ Florida,²²⁰ Oklahoma,²²¹ and Massachusetts.²²² For example, Colorado statute requires a bipartisan team of election officials to “deliver the mail ballots and return the voted ballots to the office of the county clerk and recorder” “[i]f a group residential facility does not have mail boxes in which . . . the United States postal service may directly deposit mail” whenever more than seven ballots are to be sent to that facility.²²³ Massachusetts specifies that delivery of ballots to nursing homes must occur “in person.”²²⁴

In addition, several jurisdictions remove certain procedural barriers to voting for long-term care residents. For example, Utah creates “emergency ballot” procedures for nursing home residents to cast ballots, waiving absentee ballot deadlines.²²⁵ Mobile County, Alabama, permits residents of institutional healthcare facilities to vote by mail automatically, without making a request to do so in the way required of nonresidents.²²⁶

The ease of access and utility of these statutory provisions vary significantly. Some programs require residents to request to participate through procedures that are possibly as difficult as participating in absentee voting because residents fill out a form, provide documentation, and send it in the mail. For example, Louisiana requires that voters who wish to participate in its Nursing Home Voting Program apply at least thirty days before an election; submit their application via mail, commercial carrier; or hand delivery, sign the application or (if unable) provide a signature via a registrar or witness; and provide a certification that they are a resident of a nursing home.²²⁷ The voter must also obtain a certification letter through the mail and present it on the day of supervised voting.²²⁸ By contrast, other states, such as South Dakota, waive absentee ballot identification and affidavit requirements in the context of participation in its nursing home voting program, a modification that may render it more accessible and useful.²²⁹

Another attribute of nursing home voting programs that may render them less useful is the facility’s role in requesting to participate in the program. In Kansas, for example, the facility voting program, through which a Special Election Board visits facilities to hand deliver ballots and provide assistance, is triggered

²¹⁹ COLO. REV. STAT. § 1-7.5-113(1) (2023).

²²⁰ FLA. STAT. § 101.655.

²²¹ OKLA. STAT. tit. 26, § 14-115(A)(1) (2023).

²²² MASS. GEN. LAWS ch. 54, § 91B(b) (2023).

²²³ COLO. REV. STAT. § 1-7.5-113(1).

²²⁴ MASS. GEN. LAWS ch. 54, § 91B(b).

²²⁵ UTAH CODE ANN. § 20A-3a-301(2) (West 2023) (granting waiver of normal absentee ballot deadline for long-term care residents unable to obtain manual ballot without assistance).

²²⁶ ALA. CODE § 45-49-110(a)(1) (2023) (entitling residents of Mobile County “currently residing in nursing and convalescent homes” to vote by absentee ballot).

²²⁷ LA. STAT. ANN. § 18:1333(D) (2023).

²²⁸ *Id.* § 18:1333(G).

²²⁹ S.D. CODIFIED LAWS § 12-19-9.1 (2023) (waiving these requirements “[i]f person in charge of an election conducts absentee voting at a nursing facility”).

by a state board of elections contacting a facility and asking them to participate, and facilities can opt out of the program.²³⁰ The state must conduct the program only if the facility agrees to it, thus conditioning residents' rights on the facility's preferences.²³¹ In other states, however, the program is automatic and provided in all nursing homes with a certain number of residents. For instance, South Dakota election officials must offer assistance with absentee voting, and delivery of ballots, in any long-term care or assisted living facility "from which there might reasonably be expected to be five or more absentee applications."²³² Such a provision—automatically triggering the program based not on a facility decision but on the number of would-be voters—may offer more protection to residents because it avoids the possibility of gatekeeping by facilities that decline to participate.

Enforcement of state statutes that reduce barriers to voting could play an important role in helping long-term care residents to vote in future elections. Many state nursing home voting programs are required under state statute (for example, the statute states that the procedure "shall" be provided or followed).²³³ Where states fail to provide the assistance required by statute, litigation may be appropriate to enforce residents' right to assistance. Unlike the above discussion of enforcement of federal voting rights statutes, the appropriate mechanism to enforce state-by-state election procedures varies considerably by state and would need further exploration on a case-by-case basis.²³⁴ The value of enforcement actions will also vary depending on the state. The more substantive the assistance the state is required to provide, the more value there is in the provision of that assistance. Moreover, the more substantive the assistance, the more disruptive it may be when that assistance is not provided as required. Facilities that have previously relied on state-provided assistance may again rely on that assistance and fail to make alternative plans to facilitate resident voting.²³⁵

Enforcement of state statutes that protect the voting rights of long-term care residents is especially important in the wake of the COVID-19 pandemic. In response to the pandemic, the majority of states that previously provided voting-related assistance to long-term care residents suspended that assistance or

²³⁰ KAN. STAT. ANN. § 25-2812(a) (2023) ("If the administrator or operator of the facility agrees, the county election officer and the administrator or operator shall establish a date, mutually agreed upon, for such voting to take place.").

²³¹ *Id.*

²³² S.D. CODIFIED LAWS § 12-19-9.1.

²³³ See, e.g., MASS. GEN. LAWS ch. 54, § 91B (2023); OKLA. STAT. tit. 26, § 14-115 (2023); R.I. GEN. LAWS § 17-20-14 (2023).

²³⁴ Residents of nursing homes may also wish to seek in-person voting assistance through a bipartisan team as a reasonable modification under the ADA and challenge the failure to offer such assistance as an unreasonable voting procedure, especially if such assistance is offered under statute but practically unenforced.

²³⁵ See WILLIAMSBURG STATEMENT, *supra* note 48, at 6.

modified it to reduce in-person contact.²³⁶ As an example, Wisconsin suspended its statutorily mandated program, deeming it “non-essential.”²³⁷ Similarly, Florida suspended its voting assistance program, “leaving thousands without help in a swing state with one of the largest elderly populations.”²³⁸ Colorado issued an Executive Order waiving the program through which local election officials deliver and collect ballots among facilities.²³⁹ Iowa replaced its usual program in which state Boards of Elections visited facilities, instead opting to mail absentee ballots to care facility residents who requested one.²⁴⁰ Maryland undertook a similar policy and decided to halt its traditionally comprehensive in-person assistance program and mail ballots to facilities instead.²⁴¹ Minnesota and Tennessee shifted the responsibility of administering voting in care facilities from election boards to facility staff.²⁴² Overall, these modifications made the programs less useful to residents. States mailed ballots to facilities where access to mail frequently poses a barrier, removed the opportunity to receive often necessary hands-on assistance, and relied on facility staff who, as demonstrated above, may lack training in voting procedures and may play a gatekeeping role in the voting process.²⁴³ This overall rollback of voting assistance provided in long-term care facilities likely led to the disenfranchisement of many residents who usually rely upon these programs.

IV. A CALL FOR GREATER ENFORCEMENT

Despite the immense barriers to voting while living in a long-term care facility, and even though 2.2 million people live in long-term care facilities, almost no voting rights enforcement litigation has focused on advancing residents’ voting access. This Part explains the current nonenforcement norm, and how it can be seen as the result of a potent mix of ableism and age

²³⁶ See JULIE GILGOFF, THE CHALLENGES OF VOTING FOR PERSONS IN LONG TERM CARE 6 (2021), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-ltc-voting-article.pdf [<https://perma.cc/B7UA-WMZM>] (reporting sixty-two percent of states indicated they changed their programs as such).

²³⁷ Letter from Wisconsin Elections Comm’n to Wisconsin Cnty. Clerks, Wisconsin Mun. Clerks, City of Milwaukee Election Comm’n & Milwaukee Cnty. Election Comm’n (June 24, 2020) [hereinafter Letter from Wisconsin Elections Comm’n], <https://elections.wi.gov/sites/default/files/legacy/2020-06/WEC%2520Directs%2520No%2520SVD%2520Voting%2520for%2520Remaining%25202020%2520Elections%252006-24-2020.pdf> [<https://perma.cc/78EY-NXCE>] (announcing Special Voting Deputy program would be suspended for the August 11, 2020, and November 3, 2020, elections).

²³⁸ McCarthy & Gillum, *supra* note 105.

²³⁹ GILGOFF, *supra* note 236, at 6 (reporting that Colorado placed “that responsibility on staff and personnel of residential facilities instead”).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 7.

²⁴² *Id.* at 6.

²⁴³ See *supra* notes 57-66 and accompanying text (discussing facility staff’s gatekeeping role).

discrimination. It then explains how expanded voting rights litigation brought by residents of long-term care facilities could have far-reaching implications for older adults and people with disabilities, and the American democratic system more broadly.

A. *The Current Nonenforcement Norm*

Voting rights litigation seeking to vindicate the voting rights of residents of long-term care institutions and address institutionalization-related barriers to voting is extraordinarily rare. Indeed, we have identified only three cases in the past fifty years ruling on claims brought by facility residents²⁴⁴ seeking to protect their voting rights against barriers related to their institutional status that have resulted in court decisions.²⁴⁵

In one 1976 case, *Carroll v. Cobb*,²⁴⁶ adult residents living in a state school for mental disabilities successfully challenged disability discrimination by a county elections clerk.²⁴⁷ The residents sought a judgment directing the county board of elections to accept and process their voter registration forms after a county clerk refused to register them, saying she needed further direction from her supervisor, or from a court, in order to process their registrations, citing her perception that they lacked the cognitive capacity to vote.²⁴⁸ The court held that the municipal clerk needed to comply with statutory directions and process their registrations.²⁴⁹ It also held that residence at the school for people with mental disabilities did not per se render the voters ineligible to vote.²⁵⁰ *Carroll* has since been cited for the proposition that institutional status cannot per se bar an individual from meeting mental capacity-based voting restrictions²⁵¹ and has

²⁴⁴ In addition to these, we noted a case in which an individual who had been admitted to a psychiatric hospital about a week prior to the election and was unable to leave to vote in person, requested an absentee ballot. When the ballot did not arrive on time, the individual sought, and was granted, a temporary restraining order requiring the county board of elections to count her ballot even though it was postmarked a day late. *See Mooneyhan v. Husted*, No. 12-CV-379, 2012 WL 5834232, at *6 (S.D. Ohio Nov. 16, 2012). This case is different from the three described in the main text in that it neither involved a long-term resident, nor an allegation that the problem was the result of a policy or practice involving disparate treatment of, or a disparate impact on, institutionalized persons.

²⁴⁵ To identify cases, we reviewed cases brought under the statutes we analyze above. We also looked in news databases and spoke with voting rights, disability rights, and long-term care advocates to try to identify other potential cases. It is possible that there are more claims that residents have filed but that did not reach the level of being documented in a court decision, the subject of news coverage, or known by advocates. However, even if this is the case, such litigation is, at the least, very infrequent.

²⁴⁶ 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976).

²⁴⁷ *Id.* at 355.

²⁴⁸ *Id.* at 356.

²⁴⁹ *Id.* at 359.

²⁵⁰ *Id.* at 363.

²⁵¹ *See, e.g., In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 750 A.2d 790, 791-93 (N.J. Super. Ct. App. Div. 2000) (citing *Carroll* for the notion that “a

been discussed in petitions to remove ableist language about voting competency from state constitutions and laws.²⁵²

In another case, brought prior to the enactment of the ADA, a plaintiff residing in a mental health institution brought a *pro se* complaint alleging that the state was unconstitutionally denying individuals in such institutions their right to vote.²⁵³ In denying her claim for injunctive relief, the Northern District of Illinois held that it was “conceivable” that a person involuntarily committed to a mental healthcare facility might have the right to be released for the purpose of voting if the person could arrange the necessary logistics to vote at a polling place. But it held that “the state has no obligation to bring the polling place” to such an individual.”²⁵⁴

A third case was brought by Walter Hutchins, a nursing home resident who successfully asserted his right to voting access during the COVID-19 pandemic.²⁵⁵ Amid the COVID-19 pandemic, there was a flurry of litigation challenging pandemic-related and pandemic-justified voting barriers during the November 2020 election.²⁵⁶ But in our review, this case was the only impact lawsuit that sought to vindicate the voting rights of a long-term care resident facing the unique barriers to voting in a long-term care facility during the pandemic, and it won relief—the ability to access voting assistance from a nursing home employee—for only one resident for purposes of the November 2020 election.²⁵⁷

lay person is completely unequipped to determine” whether someone applying for voter registration meets criteria to be disenfranchised due to cognitive capacity); Joel E. Smith, Annotation, *Voting Rights of Persons Mentally Incapacitated*, 80 A.L.R.3d 1116, § 4[b] (1977) (“The court noted further that for the purpose of a patient’s exercising his civil rights, the statute provided that there shall be no presumption of incompetency merely because of admission to a mental hospital.”).

²⁵² See, e.g., *State ex rel. League of Women Voters of N.M. v. Advisory Comm. to the N.M. Compilation Comm’n*, 401 P.3d 734, 748-49 (N.M. 2017) (explaining that 2010 amendment to Article VII, Section 1 of New Mexico Constitution removed “deeply offensive” and outdated terms to describe individuals with mental disabilities); see also, e.g., Ark. Att’y Gen., Opinion Letter No. 2010-160 (Apr. 5, 2011); Del. Att’y Gen., Opinion Letter No. 00-IB11 (June 19, 2000).

²⁵³ *Miller v. State Bd. of Elections*, No. 89 C 2444, 1989 WL 36212, at *1 (N.D. Ill. Apr. 10, 1989).

²⁵⁴ *Id.*

²⁵⁵ See generally *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020).

²⁵⁶ See, e.g., *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1226-27 (N.D. Ala. 2020) (holding Alabama could not prohibit curbside voting, nor could it impose witness and photo ID requirements on registered voters who were at higher risk from COVID-19 due to their age, race, or underlying medical conditions).

²⁵⁷ *Democracy N.C.*, 476 F. Supp. 3d at 240 (enjoining the statute as applied to Hutchins “until such time as [d]efendants, including the North Carolina State Board of Elections, implement a law or rule that permits the disabled individual, [p]laintiff Hutchins, to select his own person to assist him in marking, completing, and submitting his absentee ballot in accordance with Section 208 of the VRA”). In July 2022, in a case brought by Disability

We identified two additional cases that did not lead to court decisions but appear to have contributed to policy change. First, a case brought by individuals living in a state psychiatric hospital against Virginia—which had previously only allowed absentee ballots to be used by people institutionalized with physical disabilities—caused Virginia to change its policy to allow absentee ballots also to be used by those institutionalized with mental disabilities.²⁵⁸ Second, a case brought against Indiana alleging that it improperly prohibited residents of state institutions from establishing residency where their institution was located²⁵⁹ was dismissed after the state agreed to interpret the statute to allow this practice.²⁶⁰

Together, these five cases reflect the types of barriers that long-term care residents face—gatekeeping and disability discrimination by election officials and nursing home employees alike, a lack of meaningful voting access programs provided by states within facilities, and statutes that explicitly limit the rights of residents to obtain the assistance of their choosing. That the voting rights of this population have not been the subject of greater enforcement reinforces the disturbing notion—exhibited by the election clerk in *Carroll*—that long-term care residents' voting rights do not warrant protection.

Finally, even when states publicly declared before the 2020 presidential election that they suspended programs to help long-term care residents vote,²⁶¹ these announcements were not widely condemned. To date, it appears that no formal legal challenges have been brought on behalf of residents challenging the suspension of the programs.²⁶² Rather, these changes were largely accepted as necessary to prevent the spread of COVID-19 infections.²⁶³ The limited

Rights North Carolina, a federal district court enjoined enforcement of the provision prohibiting long-term care employees from providing assistance. *See supra* note 112 and accompanying text.

²⁵⁸ *See* BAZELON CTR. FOR MENTAL HEALTH LAW, VOTE. IT'S YOUR RIGHT. A GUIDE TO THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 14 & n.53 (2018), <http://www.bazelon.org/wp-content/uploads/2018/10/2018-Voter-Guide-Updated.pdf> [<https://perma.cc/5D7G-76UN>] (citing *Harvey v. Kaine*, No. 06-cv-00653 (E.D. Va. Oct. 2, 2006)).

²⁵⁹ Class Action Complaint for Declaratory and Injunctive Relief / Notice of Challenge to the Constitutionality of a State Statute at 1-2, *Ind. Prot. & Advoc. Servs. Comm'n. v. Ind. Sec'y of State*, No. 16-cv-29 (S.D. Ind. Feb. 25, 2016).

²⁶⁰ Stipulation to Dismissal of Action at 1-2, *Ind. Prot. & Advoc. Servs. Comm'n. v. Ind. Sec'y of State*, No. 16-cv-29 (S.D. Ind. Apr. 12, 2016).

²⁶¹ *See supra* notes 235-42 and accompanying text.

²⁶² The federal government did issue important guidance reminding facilities of their obligation to assist residents with voting. However, it was unclear whether facilities complied, and the efforts may well have been too little, too late at least for the 2020 presidential election. *See* GILGOFF, *supra* note 236, at 2 (noting that, according to many advocates, CMS memo was issued too late to be meaningfully enforced for November 2020 elections).

²⁶³ *See, e.g.,* Wojcik, *supra* note 20 (interviewing the Director of the Milwaukee Office at Disability Rights Wisconsin, who described Wisconsin's disability rights advocates as coming to "almost complete consensus" after extensive deliberation and consultation with

advocacy that occurred in response focused on trying to educate long-term care residents and staff about residents' voting rights.²⁶⁴ By contrast, advocacy efforts were not focused on opposing or reversing decisions to suspend election assistance programs. Nor were there widespread efforts to try to replace suspended programs with robust alternate measures (for example, dropping off ballots to facilities rather than relying on mail, devoting resources to training facility staff on how to assist residents and following up to ensure such assistance was provided, or permitting voting via videoconferencing).²⁶⁵

B. *Explanations for the Current Dearth of Enforcement*

There are several explanations for the current dearth of enforcement. One potential factor is that neither political party tends to view long-term care residents as a core constituency, or one that will clearly favor them. On the one hand, older adults tend to vote more conservatively than younger adults in a given area.²⁶⁶ On the other hand, long-term care residents are direct beneficiaries

experts, about Wisconsin's decision to suspend its statutorily mandated Special Voting Deputy program because it was "the safe thing to do" and residents could instead vote using the state's standard absentee balloting process). Despite the pandemic-related concerns of sending in-person assistance into facilities, it is worth noting that many other pandemic policies—like reducing staff transitions between nursing homes—that would have reduced in-person contact between outsiders and facilities, were not undertaken in the United States. *See* Kohn, *Nursing Homes, COVID-19*, *supra* note 126, at 4 (discussing precautions that could have been taken to protect nursing home residents but were not taken). The decision to suspend voting programs is, therefore, a reflection of a decision to deprioritize voting in particular.

²⁶⁴ For example, in California, advocates for nursing home residents issued a guide to voting. *See generally* VOTING DURING COVID-19 FOR NURSING HOME AND ASSISTED LIVING RESIDENTS (2020), http://canhr.org/publications/PDFs/voting_during_COVID19.pdf [<https://perma.cc/M82T-BZDL>]. Contemporaneously, Congressman Josh Harder of California wrote to the California Secretary of State urging "active educational outreach on the part of election officials to nursing home residents." Letter from Josh Harder, California State Rep., to Alex Padilla, California Sec'y of State (Sept. 23, 2020), <https://harder.house.gov/sites/evo-subsites/harder-evo.house.gov/files/200923%20Letter%20to%20Sec%20Padilla%20re%20Nursing%20Home%20Voting%20Access.pdf> [<https://perma.cc/6ZZD-PL8K>]. In line with advocates' concerns, the California Health and Human Services agency issued guidance to that state's long-term care facilities regarding residents' voting rights. *See generally* PAMELA DICKFOSS, PIN 20-36-ASC (2020), <https://www.cdss.ca.gov/Portals/9/CCLD/PINs/2020/ASC/PIN-20-36-ASC.pdf> [<https://perma.cc/D2RH-DSAE>].

²⁶⁵ In Arizona, a state court upheld a policy that permitted voters using the Special Election Board provisions—those whose disabilities made in-person contact risky—to vote via videoconferencing. *See generally* *Fontes v. Arizona*, No. CV 2020-011845, 2020 WL 6498932 (Ariz. Super. Ct. Oct. 6, 2020).

²⁶⁶ *See* PEW RSCH. CTR., BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY 99 (2014), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2014/06/6-26-14-Political-Typology-release1.pdf> [<https://perma.cc/7C3Q-TWJL>] (finding individuals aged sixty-five and older are disproportionately likely to have strong partisan views, especially conservative ones).

of programs traditionally promoted by liberals such as Social Security and Medicaid (indeed, over sixty percent of nursing home residents are on Medicaid).²⁶⁷ Thus, the interests of long-term care residents may align more with Democratic policy priorities. As such, it is not clearly in the interest of one of the major political parties to spend substantial resources on protecting long-term care voters' rights.

Another potential explanation is that institutionalization isolates long-term care residents, and thus they can be expected to be less involved with the types of community-organizing groups that often bring voting rights lawsuits on behalf of their members.²⁶⁸ Groups like the League of Women Voters and Common Cause often bring voting rights litigation, as do plaintiffs who are involved with, or members of, such groups. Bringing litigation as an organization using organizational or membership standing helps to assert voting rights challenges even where standing may be difficult to assert on behalf of an individual (because often, disenfranchisement on an individual level is redressable without seeking court intervention). But when a person moves into long-term care, they may lose contact with those types of community-organizing networks who may otherwise help them assert their voting rights.²⁶⁹ Also, as long-term care staff tend to control who has access to facilities, it may be more difficult for organizations to canvass, speak with, and share information with residents of care facilities than it is to do so with people living in community-based settings, so bringing voting rights challenges on behalf of long-term care residents presents practical challenges.

But a more fundamental explanation is that long-term care residents are commonly stereotyped as incapable and not seen as fully rights-bearing citizens. This stereotype, which appears to reflect a combination of ageism and ableism,²⁷⁰ is used to justify challenges to residents' ballots when they vote and policies that restrict their ability to vote in the first place.

Dozens of candidates seeking to challenge close elections have (almost always unsuccessfully) filed lawsuits challenging ballots cast by residents of nursing homes as illegitimate. For example, in 2007, a "disappointed" candidate for sheriff in Louisiana challenged his electoral loss by contending that three voters residing in nursing homes were not properly approved for the state's

²⁶⁷ HARRIS-KOJETIN ET AL., *supra* note 12, at 21 fig.23.

²⁶⁸ See generally NAT'L ACADS. OF SCIS. ENG'G & MED., SOCIAL ISOLATION AND LONELINESS IN OLDER ADULTS: OPPORTUNITIES FOR THE HEALTH CARE SYSTEM (2020) (reviewing causes and impacts of social isolation and loneliness in older adults).

²⁶⁹ See Port et al., *supra* note 93, at 594-95 (examining factors that affect level of contact between nursing home residents and their family and friends).

²⁷⁰ See, e.g., Adam Rogan, *Eight Cases of Election Fraud at Racine County Nursing Home, Sheriff Schmaling Says*, J. TIMES (Oct. 28, 2021), https://journaltimes.com/news/local/govt-and-politics/eight-cases-of-election-fraud-at-racine-county-nursing-home-sheriff-schmaling-says/article_1722e503-a13b-5f3d-bd7e-c72a68962e4d.html (discussing investigation of voting fraud where the "evidence" of fraud was that "mental capacities" of residents voting in 2020 presidential election "had diminished due to age and/or disease").

Special Program for Handicapped Voters by the board of election.²⁷¹ The trial and appellate court found “no merit to” that assertion.²⁷² In 2021, an “unsuccessful” state senate candidate in Minnesota contested election results based, in part, on her “concerns” about the “process” for absentee voting at facilities, which the court found “simply too vague” and unfounded to warrant proceeding in the challenge.²⁷³ At the heart of these challenges, pursued across many states over the past several decades,²⁷⁴ is an assumption that nursing home residents’ votes are inherently suspect and worthy of scrutiny.

Public officials have also cast suspicion on nursing home votes and alleged fraud—and even threatened criminal sanctions—based not on actual evidence of fraud but on misperceptions of the relationship between one’s cognitive disability and one’s voting rights. For example, a sheriff’s department in Racine County, Wisconsin, started investigating “fraud” in nursing home voting after learning that a quarter of a local nursing home’s residents voted in the 2020 presidential election.²⁷⁵ This voting behavior apparently was seen as so suspicious that the sheriff’s department contacted voting residents’ families to determine whether the families thought the voters had sufficient cognitive capacity to vote.²⁷⁶ After talking with family members, the sheriff announced that he had found eight cases of “election fraud” in the nursing home.²⁷⁷ Yet, at least for seven of the eight cases of alleged “fraud,” the only evidence of “fraud” was that a resident voted who the sheriff’s department did not believe should have voted.²⁷⁸ That opinion, in turn, was based on the voters’ families reporting that the voters did not have the mental capacity to vote due to old age or

²⁷¹ *Lipsey v. Dardenne*, 970 So. 2d 1237, 1244 (La. Ct. App. 3d Cir. 2007) (summarizing Lipsey’s argument that three nursing home residents were not properly qualified to vote).

²⁷² *Id.* at 1245.

²⁷³ *Bergstrom v. McEwen*, 960 N.W.2d 556, 564-65 (Minn. 2021).

²⁷⁴ *See Keeley v. Ayala*, 179 A.3d 1249, 1268 (Conn. 2018) (rejecting trial court’s conclusion that supervised absentee balloting at nursing home did not comply with governing statutes); *Brutsche v. Coon Rapids Cmty. Sch. Dist.*, 255 N.W.2d 337, 339-40 (Iowa 1977) (rejecting challenge to election based on alleged procedural irregularities in nursing home ballots); *Brandow v. Smythe*, 180 N.Y.S.2d 332, 335 (Sup. Ct. 1957) (rejecting losing candidate for town councilman’s claim that nursing home resident had committed fraud where her earlier ballot application form listed her prior place of residence but later one listed her nursing home), *aff’d*, 180 N.Y.S.2d 541 (1958).

²⁷⁵ *See Rogan*, *supra* note 270.

²⁷⁶ *See id.* (“[The sheriff] said he reached out to the families of more than 40 Ridgewood residents who voted in the election; eight of them said their loved one should not have voted and would not have consciously wanted to vote because of their own diminished mental capacity.”).

²⁷⁷ *See id.* (reporting sheriff’s conclusion that there were eight cases of election fraud based on family reports).

²⁷⁸ The eighth resident had, according to family members, been “adjudicated incompetent” by a court. *Id.* Whether this adjudication stripped the individual of the right to vote cannot be determined from news reports. If it did, then the vote would not have been valid.

“disease.”²⁷⁹ The sheriff declined to interview the voters themselves on the grounds that he did not think that actually speaking to the residents would be “productive” because their families had described them as having cognitive deficits.²⁸⁰

The powerful impact of simultaneous ageism and ableism can also be seen in the willingness of policymakers and scholars to condone practices that burden the voting rights of long-term care residents. An example of how stereotyped assumptions and attitudes can lead to a willingness to restrict their voting rights can be seen in a prominent article published on nursing home residents’ voting rights in the *Journal of the American Medical Association*.²⁸¹ The article, authored by leading scholars in the fields of law, medicine, and social work, advocated for the development of long-term care-specific guidelines and policies to encourage facility staff to administer cognitive screening tests to determine which residents should vote.²⁸² This unprecedented barrier to voting was justified as a tool to prevent “fraud.” As article co-author Pamela Karlan explained to the New York Times, in her view, screening nursing home residents for capacity to vote was important to prevent “wholesale fraud” by “workers for a party or a candidate” who might otherwise steal resident votes.²⁸³ Yet the authors had no evidence that such fraud occurred to any significant degree,²⁸⁴ nor did they offer a rationale for addressing fraud by limiting the voting rights of would-be fraud victims (instead of, for example, providing better oversight of—or penalties for—those who might commit fraud).

²⁷⁹ Adam Rogan, *Josh Kaul Won’t Take Up Racine Sheriff’s Call for Statewide Elections Investigation. But Now Gableman Is*, J. TIMES (Nov. 11, 2021), https://journaltimes.com/news/local/govt-and-politics/josh-kaul-wont-take-up-racine-sheriffs-call-for-statewide-elections-investigation-but-now-gableman/article_55c2bb73-8ee4-5c0f-85cb-f19dbdef43b1.html.

²⁸⁰ *Id.*

²⁸¹ See generally Karlawish et al., *Addressing*, *supra* note 9.

²⁸² See *id.* at 1348 (“[P]ersons assisting a cognitively impaired person applying for an absentee ballot or going to a polling place should have access to a simple, standardized instrument for assessing capacity to vote.”). The authors have since retreated from the article’s full-throated endorsement of staff gatekeeping. See Jason Karlawish, Paul S. Appelbaum, Richard Bonnie, Pamela Karlan & Stephen McConnell, *Policy Statement on Voting by Persons with Dementia Residing in Long-Term Care Facilities*, 2 ALZHEIMER’S & DEMENTIA 243, 244 (2006) (advising against “systematic screening of competence to vote based exclusively on a diagnosis of dementia or on residence in a long-term care facility,” but recommending staff assess “residents whose voting competence is reasonably in doubt”).

²⁸³ See Denise Grady, *Change Urged for Nursing-Home Voters*, N.Y. TIMES (Sept. 15, 2004), <https://www.nytimes.com/2004/09/15/politics/campaign/change-urged-for-nursing-home-voters.html>.

²⁸⁴ When questioned about the rate of such fraud, the lead author, Jason Karlawish, explained that he had a “hunch” it was more than trivial but voiced support for having facility staff serve as gatekeepers even if it was trivial. See Jason Cato, *More Oversight Urged for Nursing Home Voting*, TRIBLIVE.COM (July 2, 2007, 12:00 AM), <https://archive.triblive.com/news/more-oversight-urged-for-nursing-home-voting/> [https://perma.cc/2S9C-94YB].

A dismissive attitude toward long-term care voters can likewise be seen in the rhetoric offered by election officials in suspending voting assistance programs. For example, in announcing the suspension of its voting assistance program the Wisconsin Elections Commission dismissively categorized special voting deputies as “non-essential visitors” who should be restricted from entering nursing homes even though an executive order restricting nonessential visitors was no longer in effect in the state.²⁸⁵

This lack of concern about residents’ voting rights is part of a larger, historical acceptance—and at times the active encouragement—of the disenfranchisement of institutionalized persons.²⁸⁶ Rabia Belt’s research has shown institutionalization has led to disenfranchisement since the nineteenth century when such institutions first came into prominence in the United States.²⁸⁷ As Belt documents, nineteenth-century lawmakers justified this disenfranchisement in ways that mirror those offered today: they cited the fear that the residents might be vulnerable to election fraud, residents’ perceived physical and mental incapacity to vote, and the broader notion that residents do not have equal membership in political life.²⁸⁸

Today, as Belt has explored, the disenfranchisement of adults in healthcare institutions largely goes unnoticed.²⁸⁹ In contrast, there have been substantial efforts undertaken to delink criminal institutionalization and disenfranchisement, in part because of the clear racial justice implications of disenfranchising people with prior felony convictions and incarcerated people.²⁹⁰ In part, this difference likely reflects the importance voting rights litigators rightly place on ensuring that racial minorities have access to the vote.²⁹¹ As we discuss in more detail below, the disenfranchisement of long-term

²⁸⁵ Letter from Wisconsin Elections Comm’n, *supra* note 237.

²⁸⁶ See Belt, *Mass Institutionalization*, *supra* note 8, at 884-89 (providing historical account of steps states have taken to disenfranchise civilly institutionalized persons).

²⁸⁷ *Id.* at 876-79 (describing incentives for and development of institutions).

²⁸⁸ *Id.* at 882-83 (citing critiques of giving institutional residents voting rights authored by Horace Greeley and other nineteenth-century delegates); see also Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right To Vote*, 69 STAN. L. REV. 435, 471-72 (2017) (describing political opposition to enfranchisement of civil war veterans residing in veterans’ homes and how it was fueled, in part, by concerns it would lead to political corruption because veterans would be exploited by party bosses).

²⁸⁹ See Belt, *Mass Institutionalization*, *supra* note 8, at 861 (“Despite the decades—and indeed centuries—of controversy about institutional resident voting, aspiring and actual voters like the . . . residents [of a California state hospital] fall through the cracks of the current discussion embroiling scholars, activists, and the general public about voting for institutional residents.”).

²⁹⁰ See *id.* (“Mass incarceration drives the debate about voting by institutionalized people in present-day America.”).

²⁹¹ Pursuing voting rights violations in criminal justice institutions and not in healthcare ones, by contrast, could not be justified on the grounds that healthcare institutionalization is voluntary and institutionalization in the criminal legal system is involuntary. Residence in a long-term care facility is often less than fully voluntary. Individuals subject to guardianship

care residents has less obvious racial justice implications than disenfranchising those in the carceral system, in part because of a lack of available information, although it may actually have substantial and concerning racial justice implications.

Finally, one reason that long-term care residents' rights may tend to go unenforced is that voting rights attorneys are occupied with other pressing priorities. Enabled by the Supreme Court's 2013 decision striking down Section 5 of the VRA,²⁹² states have passed an increasing number of restrictive voting laws, which voting rights lawyers have rallied to challenge across the country.²⁹³ Likewise, the Supreme Court's decisions making it more difficult to enforce Section 2 of the VRA²⁹⁴ have created substantial new work for voting rights attorneys. In this changing legal landscape, voting rights lawyers are fighting for rights that had for several decades been well-established. Given limited resources, they are left with many competing priorities.

C. *The Value of Greater Enforcement*

In the aftermath of the COVID-19 pandemic when so many residents were prevented from exercising their votes, voting rights enforcement should increasingly address the relationship between healthcare institutionalization and disenfranchisement, the "shadowy twin"²⁹⁵ of felon disenfranchisement.

Whether long-term care residents can vote matters. The right to vote is one of a citizen's most fundamental and important rights. The right to vote is also a source of personal empowerment and status. Voting is a socially validating

or conservatorship may be involuntarily institutionalized because they have been stripped of the right to choose where to live. Even those legally entitled to refuse institutionalization may face involuntary institutionalization because facilities admit them without their consent, or they lack other ways to access needed care. *See generally* Marshall B. Kapp, *Where Will I Live? How Do Housing Choices Get Made for Older Persons?*, 15 NAELA Q. 2, 4 (2002) (explaining that nursing home residents can be admitted legally without their consent if person consenting on their behalf is empowered to do so by guardianship order or by valid power of attorney, but acknowledging that nursing home admissions "routinely" occur without residents' consent even if there is no such lawful authority).

²⁹² *Shelby County v. Holder*, 570 U.S. 529, 530 (2013) (holding coverage requirement used to determine which states were subject to VRA Section 5's preclearance requirement was unconstitutional).

²⁹³ *See The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/5L3J-U2JN>] (examining statutes related to voting rights adopted after *Shelby County* and legal challenges to those statutes).

²⁹⁴ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2326, 2338-40 (2021) (providing new "guideposts" for evaluating voting laws under Section 2 of the VRA, including state's interests at stake and degree to which law departs from voting laws that were in place in 1982).

²⁹⁵ Belt, *Mass Institutionalization*, *supra* note 8, at 852, 867 (demonstrating that "disenfranchisement in welfare institutions and carceral institutions grew up together," such that tactics used to disenfranchise those in welfare institutions—and normalization of that practice—later underpinned disenfranchisement of those confined in carceral institutions).

process—a way of demonstrating to others and to oneself membership in a community. By contrast, exclusion from the franchise serves as “a mark of inferiority, a consignment to a degrading form of second-class citizenship.”²⁹⁶ Enforcing the right to vote for this population is a way to avoid further stigmatization and dehumanization of its members.²⁹⁷

Voting is a potentially valuable source of political power for residents of long-term care institutions. It is a tool they could use to protect their distinct interests, such as, in government support for long-term care services, quality oversight, and so on. For many long-term care residents, voting may be especially valuable because it may be their sole remaining source of exercising influence over the political process. The disabilities that led to their institutionalization often mean that other forms of political influence are inaccessible to them: they may not be able to march in protest or canvass for candidates or causes; many are not able to mail a letter or make a telephone call without assistance.

Perhaps more fundamentally, the systemic disenfranchisement of long-term care residents should not be tolerated because selectively disenfranchising long-term care residents disproportionately burdens other vulnerable and marginalized segments of the American population. Long-term care residents are themselves a highly vulnerable and marginalized population. Long-term care residents are disproportionately the very oldest and frailest members of society. Indeed, over half are at least eighty-five years of age, and over sixty percent need assistance with at least three activities of daily living (such as walking, transferring in and out of bed, or using a toilet).²⁹⁸ In addition, long-term care residents are an inherently vulnerable population as institutionalization itself is a source of disadvantage, marginalization, and isolation.

Long-term care residents are also disproportionately drawn from other vulnerable and marginalized populations because not all segments of the population have the same access to resources and community-based supports that might help them avoid institutionalization. Women are more likely than men to become long-term care residents, even controlling for life expectancy.²⁹⁹ Likewise, a history of being disabled, not having a robust social network, and

²⁹⁶ James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right To Vote*, 145 U. PA. L. REV. 893, 901 (1997); see Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 365-66 (2003) (arguing that treating disabled citizens differently from nondisabled citizens for purposes of voting procedures and access perpetuates negative stereotypes of disabled persons).

²⁹⁷ See Belt, *Contemporary Voting*, *supra* note 6, at 133.

²⁹⁸ See CAFFREY ET AL., *supra* note 14, at 1-3 (reporting that fifty-five percent of residential care community residents were aged eighty-five and over and sixty-one percent need assistance with three or more activities of daily living).

²⁹⁹ HARRIS-KOJETIN ET AL., *supra* note 12, at 20 fig.21 (reporting that women make up more than half of residents at adult day services centers, home health agencies, hospices, nursing homes, and residential care communities).

not owning one's own home correlate with an increased risk of institutionalization.³⁰⁰

Drawing conclusions about the racial justice implications of disenfranchising residents is limited by the information available. For example, as mentioned previously, no cross-sectional data set about the race and voting behavior of the population of long-term care residents has been collected. Nor do reports of voting-related violations in long-term care facilities provide insight, as they do not identify, for example, the race of the people who experienced voting rights violations, the racial composition of the facilities where voting rights violations occurred, or whether racial motivations or biases animated ableist gatekeeping by facility staff. Moreover, the fact that long-term care residents are disproportionately Caucasian relative to the general population means that the disenfranchisement of this population may not, on its surface, raise racial justice concerns, as white Americans have not experienced systemic disenfranchisement based on race.³⁰¹

Policies that disenfranchise long-term care residents may, however, disproportionately burden racial and ethnic minorities even though long-term care residents are disproportionately white relative to the general population. Given that long-term care residents are often dependent on staff to exercise their voting rights, residents of facilities with lower staffing levels might face greater barriers to voting—and thus higher rates of disenfranchisement—than those in better-staffed facilities. Relative to white long-term care residents, residents who are members of racial and ethnic minorities tend to live in facilities with lower staffing levels³⁰² and more deficiencies in care.³⁰³ In addition, residents in nursing homes with high proportions of racial and ethnic minorities report, on average, lower quality of life than those in nursing homes with a low proportion of residents who are members of racial and ethnic minorities.³⁰⁴ Thus, there is reason to be concerned that long-term care residents who are members of racial and ethnic minority groups may be especially likely not to receive the assistance

³⁰⁰ See Melanie Lupp, Tobias Luck, Siegfried Weyerer, Hans-Helmut König, Elmar Brähler & Steffi G. Riedel-Heller, *Prediction of Institutionalization in the Elderly. A Systematic Review*, 39 AGE & AGING 31, 32 (2010) (reporting on meta-analysis of literature on predictors of nursing home placement).

³⁰¹ CAFFREY ET AL., *supra* note 14, at 2 (finding that eighty-nine percent of residential care residents in United States were non-Hispanic Caucasian).

³⁰² See Yue Li, Charlene Harrington, Helena Temkin-Greener, Kai You, Xueya Cai, Xi Cen & Dana B. Mukamel, *Deficiencies in Care at Nursing Homes and Racial/Ethnic Disparities Across Homes Fell, 2006-11*, 34 HEALTH AFFS. 1139, 1139 (2015) (discussing racial and ethnic disparities in care in U.S. nursing homes).

³⁰³ Tetyana T. Shippee, Weiwen Ng, Yinfei Duan, Mark Woodhouse, Odichinma Akosionu, Haitao Chu, Jasjit S. Ahluwalia, Joseph E. Gaugler, Beth A. Virnig & John R. Bowblis, *Changes over Time in Racial/Ethnic Differences in Quality of Life for Nursing Home Residents: Patterns Within and Between Facilities*, 32 J. AGING & HEALTH 1498, 1498-99 (2020) (summarizing literature on racial discrepancies in nursing home quality of care).

³⁰⁴ See, e.g., *id.* at 1505-06 (reporting findings based on study of resident-reported quality of life in 376 nursing homes in Minnesota).

they need to vote, much as they are less likely to have other care needs met. Residents who do not speak English may be especially likely to be disenfranchised, as they may additionally need language assistance to vote.

In addition, America's pervasive history of racist voter suppression suggests that, where states and institutions are given de facto discretion to decide who will receive voting-related assistance, this discretion is often used in ways that disenfranchise minority populations.³⁰⁵ Thus, the status quo—in which there are substantial variations among facilities in the level of assistance and election-related information provided to residents³⁰⁶—should be concerning because it creates substantial opportunity for both deliberate and unconscious bias to shape access to the ballot. For example, given that nursing homes are highly racially segregated institutions,³⁰⁷ efforts to assist voters at some facilities that are not extended to other facilities can be expected to have substantial racial justice implications.

Overall, the systemic disenfranchisement of long-term care residents has implications for the legitimacy of the electoral system. Disenfranchisement of any substantial number of citizens undermines democratic legitimacy because, as Ihaab Syed has noted, higher rates of participation in elections help legitimize a democratic system of government that is premised on obtaining the “consent of the governed.”³⁰⁸ This disenfranchisement may be especially consequential for the legitimacy of state and local elections. As our research suggests, residents appear to have less access to state and local elections than to federal ones.³⁰⁹ Yet, in these smaller races with lower overall turnout, residents' votes are more likely to be outcome-determinative because they are likely to represent a larger proportion of the total votes cast.

Disenfranchisement of long-term care residents is a threat to democratic legitimacy not only because it depresses voter turnout and may affect election outcomes but also because it selectively depresses the vote of a distinct interest group. Voting access increases the likelihood that the viewpoints and interests of this distinct group will be considered when officials are elected or ballot

³⁰⁵ See Arusha Gordon & Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 MICH. J. RACE & L. 23, 27-36 (2015) (reviewing evidence of implicit bias in voting processes).

³⁰⁶ See GILGOFF, *supra* note 236, at 6-15 (reporting substantial differences in level of voter outreach and education in residential facilities both among and within states, based on survey sent to secretaries of state and state election directors in September 2020).

³⁰⁷ Deborah S. Mack, Bill M. Jesdale, Christine M. Ulbricht, Sarah N. Forrester, Pryce S. Michener & Kate L. Lapane, *Racial Segregation Across U.S. Nursing Homes: A Systematic Review of Measurement and Outcomes*, 60 GERONTOLOGIST e218, e227 (2020) (reviewing existing literature in meta-analysis and finding “racial segregation exists across nursing home facilities,” particularly white-Black segregation).

³⁰⁸ See Ihaab Syed, *How Much Electoral Participation Does Democracy Require? The Case for Minimum Turnout Requirements in Candidate Elections*, 66 UCLA L. REV. 2024, 2037-38 (2019) (describing how higher rates of participation help legitimize U.S. government).

³⁰⁹ See *supra* notes 55-57 and accompanying text.

propositions voted on, thus biasing election results. Disenfranchisement correspondingly decreases the extent to which elected officials can expect to be held accountable by long-term care residents, and thus consigns such residents to a form of “second-class citizenship.”³¹⁰ Given that long-term care residents are not a cross section of Americans, it also runs the risk of depressing the political power of the demographic groups from which disenfranchised long-term care residents are drawn.

Litigation and other efforts to protect the voting rights of long-term care residents could not only reduce the harms associated with disenfranchisement but also send a powerful anti-stereotyping message. It could signal that long-term care residents remain full citizens with rights that warrant respect and that they must not be assumed incapable of exercising those rights. Thus, it has the potential to help erode the ableist and ageist attitudes that led to long-term care residents facing profound barriers to exercising their right to vote.

As the U.S. population ages, the need to defend the voting rights of those with long-term care needs will only become more important. In the United States, the population of adults aged sixty-five and older is projected to almost double from 2016 to 2060, resulting in an additional 45.5 million elderly residents.³¹¹ As the population ages, the number of people living in long-term care institutions also can be expected to rise. Thus, practices that disenfranchise residents are increasingly likely to threaten democratic legitimacy, and residents’ votes are increasingly likely to have the potential to be decisive in critical races.

CONCLUSION

Residents of institutional healthcare settings have the right to vote and tend to want to do so, but increasingly encounter barriers to exercising that right. Institutionalization can create profound and often insurmountable barriers to all aspects of the voting process: registering to vote, completing a ballot, and having a completed ballot counted. Some of these barriers are the result of generally applicable laws and procedures that increase the burden associated with voting for people in long-term care settings. Others are the result of policies and practices that selectively burden long-term care residents because of the deep suspicion of these voters—a suspicion that reflects and reinforces a potent mix of ageism and ableism.

Fortunately, as we have shown, a wide variety of existing statutes could be employed to defend the voting rights of this population. A new wave of voting rights enforcement and litigation using the roadmap we have laid out could dismantle the stark barriers to voting in long-term care facilities. Indeed, even a

³¹⁰ Belt, *Contemporary Voting*, *supra* note 6, at 1522 (“Excluding people with disabilities from the franchise threatens democratic legitimacy and consigns an already-disadvantaged population to second-class citizenship.”).

³¹¹ *An Aging Nation: Projected Number of Children and Older Adults*, U.S. CENSUS BUREAU (Mar. 13, 2018), <https://www.census.gov/library/visualizations/2018/comm/historic-first.html> [<https://perma.cc/M5Y9-F94G>] (depicting population projections).

few, targeted cases defending the voting rights of long-term care residents could undermine the harmful assumption that this population does not have the ability to vote and that their voting rights are—as some states suggested amid the COVID-19 pandemic—“non-essential.”